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ALEXANDER L. STEVAS,

No. 82-660

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

UNITED STATES OF AMERICA, *Petitioner*

v.

HARRISON P. CRONIC, *Respondent*

On Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

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BRIEF FOR THE RESPONDENT

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QUESTION PRESENTED

Whether a Court of Appeals may reverse a conviction on direct appeal on the ground that the accused did not receive adequate representation without stating in its opinion that defense counsel was guilty of a specific dereliction and describing the manner in which such dereliction was prejudicial.

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CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides in pertinent part:

> No person shall be . . . deprived of life, liberty, or property, without due process of law . . .

The Sixth Amendment to the United States Constitution provides in pertinent part:

> In all criminal prosecutions, the accused shall enjoy the right . . . to have the assistance of Counsel for his defense.

18 United States Code Section 1341 provides in pertinent part:

> Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, . . . for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Post Office Department, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail . . . any such matter or thing, shall be fined not more than $1,000 or imprisoned not more than five years, or both.

STATEMENT OF FACTS

Introduction

Respondent was convicted and sentenced to serve twenty-five years in prison in a complex mail fraud case which took the government four and one-half years to prepare. He was compelled to meet the government's case, which involved eighteen witnesses and hundreds of documents, with the assistance of a wholly inexperienced real estate lawyer who was given less than 25 days, without motions or substantial expert assistance, to prepare. The defense lawyer, out of ignorance and ill preparedness, overlooked a very substantial defense that was apparent on the facts of the government's case and instead

pursued a ridiculous and legally untenable one. He made only ten objections during the trial, requested no Jencks Act material, made no requests to charge or objections to the charge, and permitted the case to go to the jury as one in which respondent had victimized a bank of more than $400,000 whereas in fact the bank had suffered no loss and had made a profit.

The Charges

On February 5, 1980, Respondent Cronic, Wylie Merritt and Carolyn Cummings were indicted in a thirteen count, fifteen page indictment charging mail fraud under 18 U.S.C. § 1341 and § 2 (aiding and abetting). Count 1 alleged that Skyproof Manufacturing Company was "largely a facade and pretense" to permit the defendants to float insufficient fund checks between banks in Norman, Oklahoma and Tampa, Florida to "create inflated or false balances in the various bank accounts" and that the defendants knew "there were not sufficient funds on deposit to cover said checks" (J.A. 11).

The indictment alleged that between June and October, 1975, defendants caused to be deposited in the Oklahoma bank $4,841,073.95 in checks and wire transfers drawn on the Tampa bank and that they "would and did represent" to the Oklahoma bank that "there were sufficient funds in the . . . account of the [Tampa bank] to pay the checks previously drawn," and they knew otherwise (J.A. 13).

Various portions of the indictment alleged that the purpose of the "scheme" was to induce the Oklahoma bank "to part with its funds and to convert and appropriate such funds to their own profit and use."

Each of the thirteen counts then alleged that, pursuant to the scheme, specific checks were mailed from an Oklahoma bank to a trust company in Chicago for clearance. These mailings, the indictment alleged, were "willfully and knowingly . . . caused to be" mailed by the defendants.

Despite its prolixity, the indictment did not specify any misrepresentations by any of the defendants other than that of

depositing the checks. Nor did the indictment state that the defendants intended to deprive permanently the Oklahoma bank of its money. No motion for particulars was filed.

Pretrial Proceedings

Respondent and Cummings were initially represented by Arnold Levine of Tampa, Florida. On June 6, 1980, however, Levine moved to withdraw as counsel for respondent on grounds of conflict of interest. Respondent objected *pro se*, asserting, *inter alia*, that if there was a conflict, it would not be cured by permitting Levine to represent only Cummings. Since Levine had represented them both since 1975 and prepared a joint defense, confidential communications from respondent to Levine could therefore be used against respondent in the representation of Cummings (Defs. motion to deny withdrawal of Arnold Levine, filed June 11, 1980).

At the hearing on Levine's motion to withdraw as respondent's lawyer, on June 19, 1981, a lawyer named Chris Colston introduced himself to the court. The court said:

> I haven't met him. I found him on the alphabetical list of eligible lawyers and I appointed him to represent Mr. Cronic, but I haven't met him. I talked to him on the phone (J.A. 26).

Later in the hearing, the judge explained that he had appointed Colston the previous week to represent respondent at the hearing on the motion to withdraw (J.A. 27). Respondent, expressing surprise, said that he had not even discussed the matter with Colston (J.A. 27) and therefore wished to examine Mr. Levine himself, which he did. Mr. Colston took no part in the hearing.

After brief testimony and arguments, the court decided to "shut this hearing down" (J.A. 31), declaring that there was too much animosity between Levine, Cummings and respondent to require Levine to continue to represent respondent. As to Levine's representation of Cummings, the court said, "I'm not saying yes or no with respect to that . . . I'm just saying

. . . it's impossible for anybody to try to represent both of you" (J.A. 32).

The court indicated that the trial would begin on June 30, eleven days hence (J.A. 33). Respondent replied:

> I don't feel like I could possibly get a fair defense giving my attorney one or two weeks to prepare for this when Mr. Levine has had the advantage of a five-year investigation, all the documentations, a complete review of all of that prior to my testimony before a federal grand jury in Tampa (J.A. 33).

The scheduling issue was deferred until the afternoon. At that time, Levine stated that he was prepared to proceed, on behalf of Cummings, but that the Government's documentation was "a foot and a half high if not two feet high" and counsel for Cronic hadn't even seen it:

> It constitutes hundreds and hundreds of checks and thousands of entries and some of the witnesses . . . are . . . from Florida . . . I would respectfully submit . . . that if counsel for Mr. Cronic were to devote all his working days, he might be able to be ready in 30 days, might be, if he were to devote all his time just to this case.
>
> THE COURT: I'm sure he's going to be beholden to me for selecting him. Of course, he was taken off the alphabetical list, I haven't met the gentleman before I talked to him on the phone . . . (J.A. 35).

Mr. Colston then requested a minimum of 30 days.[1] The court peremptorily set the trial date for July 14, twenty-five calendar days hence (J.A. 35).

The judge then suggested "a dismissal or plea bargain or something" and was informed that there had been discussions with Levine about a bargain for Cummings (J.A. 36).

Colston then asked if he could file motions and hire an investigator. The court replied that he could not file "regular motions, motions to suppress or that sort of thing" but he could file

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[1] He also filed a written motion for continuance (Record, V. 1, p. 20).

a motion for an investigator (J.A. 37). Colston said his "most pressing assistance needed right now would be of an accountant" since the Government had employed two accountants. The court indicated it would grant such a motion but "$300.00 is the most we can pay" (J.A. 37). The court also said it would approve a motion for appointment of an investigator (J.A. 38).

Respondent then stated that Colston had just told him his "specialty is real estate law, he's only tried — has been involved with one federal criminal case in his entire legal experience. . . ." (J.A. 38).

The judge interrupted:

> If you're getting around to saying you want to select your own lawyer, no way. You have got a good lawyer and if you want your own, go hire your own. This man was appointed under our system. We select qualified lawyers. He's qualified or I wouldn't have appointed him . . . (J.A. 38).

From June 19, 1980, the day of his appointment, until the trial, 25 days later, Colston filed no motions, not even for appointment of an accountant or an investigator.[2] Nor did Colston renew respondent's objection to Levine's representation of Cummings, despite her guilty plea and role as the government's chief witness. Colston did obtain subpoenas for six witnesses (J.A. 4) but called no witnesses at trial (J.A. 94).[3]

The Trial

At the outset of the trial, which began on July 14, the court explained the theory of the indictment to the jury pool, stating that defendants Cummings, Merritt and respondent had devised a scheme to defraud, known "in banking circles as a kiting scheme" (T. 6). The essence of it was the depositing of checks,

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[2] He did not agree to reciprocal discovery until June 24th. Memorandum of Reciprocal Discovery, Record, Vol. 1, p. 203.

[3] It is not clear how many witnesses were actually served or appeared (J.A. 94).

"a fraudulent check . . . when really there is no money there, just a bank balance showing that there was money" (T. 7), and the mails were used in the bank's clearing process (T. 8).

Mr. Colston introduced to the court one Ryland Rivas "who will be assisting the defense in this case" (T. 2). The record does not disclose whether Rivas attended regularly nor does it record any participation by him other than a nine word statement on the third day of trial (T. 463).

Mr. Colston apologized to the jury for reading his opening statement, explaining "this is my first trial" (J.A. 44). The defense outlined in his opening statement was that respondent had more than sufficient funds to cover all the overdrafts but did not do so because "he wasn't involved" (J.A. 41). He had no control over Skyproof, its bank accounts, or its checks (J.A. 41). Colston also implied that no one was misled; the bank chose to honor overdrafts in its own, informed self-interest (J.A. 41).

The government presented its case through eighteen witnesses over four days. Approximately sixty exhibits were entered into evidence, consisting mainly of dozens of checks, bank statements of four bank accounts covering periods of three to six months, records of mailing, and charts tracing flows of funds through the various bank accounts.

The government's evidence showed that in 1973, respondent's father founded Skyproof Manufacturing Company in Tampa, Florida. It fabricated trusses, or roof supports, for mobile homes. Initially, there were only two or three employees and one small building (T. 509).

Respondent took over the operation in July, 1974. The business grew under respondent's control and eventually three buildings were used and 18 to 20 employees worked (J.A. 75). The payroll was about $10,000 per month (T. 242). There were lengthy back orders (T. 349) and at one point, in October, 1975, it was necessary to work three shifts (T. 504). No records of Skyproof's assets, sales, expenses, or income were offered but one witness guessed that sales were $30,000 per month (J.A. 75); another, that they were $150,000 in 1975 (T. 483).

There were cash flow problems, however. Twenty thousand dollars was borrowed from a bank (T. 506). Another $15,000 was borrowed from a lumber supplier (T. 506), who testified that Skyproof often could buy all the lumber he could supply (T. 313).

When respondent took over the operation of Skyproof, he brought defendant Cummings in to help with secretarial work (T. 473). He also made her president and sole shareholder, explaining to Cummings that this was necessary because a previous business of his had gone bankrupt and he had received bad publicity. There was also an I.R.S. lien. As a consequence, respondent couldn't have anything in his own name (T. 475).

Although president and sole shareholder, and holding herself out to be such (T. 506), Cummings testified that respondent was in complete control and that she did only what he told her to do (J.A. 83). Whenever he gave her papers to sign, she did so, rarely reading them or asking questions (J.A. 83). She regarded herself as president "legally but not morally" (J.A. 85).

In the spring of 1975, respondent contacted co-defendant Wylie Merritt, who testified under an agreement that the charges would be dismissed against him (J.A. 78), at Merritt's CPA office in Norman, Oklahoma (T. 365). Merritt had done accounting work for respondent since 1969 (T. 362). Respondent asked Merritt to help him secure financing for Skyproof (T. 362). Merritt was unable to find any financing, but agreed to help in a small way by "factoring" — advancing his personal funds against factory orders and being repaid, with interest, when the orders were filled and paid for (T. 370). Under this arrangement, Merritt wrote checks to Skyproof on his account at the First National Bank of Norman and sent them to Tampa (T. 375). He would then receive a check from Skyproof (signed by Cummings) and Cummings or respondent would call him and tell him when to deposit it (T. 374). Later, in June, he signed blank checks and sent them to Tampa and received reimbursing checks, also signed in blank. The amounts became

larger (T. 383). Merritt decided he wanted to discontinue the factoring because he had other needs for his money. The arrangement was terminated in late June, 1975 (T. 385).

In the course of Merritt's factoring, some checks were lost and, as a result, there were some overdrafts in his account at First National (T. 413). Because of the overdrafts, Merritt had to borrow $3,250 (T. 381). Ultimately, he was repaid and earned about $1,300 for his factoring (T. 409). Merritt was aware of no "kiting scheme" or scheme to defraud (J.A. 79-80, T. 422-3).

In June, 1975, respondent informed Merritt that his business was expanding and its books were in bad shape (T. 372, 414). He asked Merritt to take over the bookkeeping (T. 372). Merritt opened an account for Skyproof at the Norman Bank of Commerce, a relatively new bank and a client of Merritt's (T. 372, 379).

From late June through September, although no longer using his own funds to help finance Skyproof, Merritt, on an almost daily basis, filled in the amounts on checks drawn on Skyproof's Tampa account and deposited them in the Norman bank account. Approximately once a week, Cummings sent him signed checks with the amounts blank. She called Merritt every day or so to tell him the amounts to fill in (T. 396, 407).

Respondent, when in Tampa, kept a record of the checks in a notebook and told Cummings to call the Tampa bank for a balance almost daily (T. 495). Respondent thus determined that checks deposited in Norman took three or four days to arrive at the Tampa bank (T. 496). Respondent then determined how much was needed in deposits every day, advised Cummings, and she would telephone Merritt with the amounts to deposit (T. 496).

In August, respondent asked Merritt to examine another truss company for possible purchase. He did so but recommended instead the purchase of a bottling plant in Paris, Texas (T. 387). In September, respondent agreed to buy the plant (T.

318). Cummings signed the papers (T. 529). The bottling plant, known as Paris Processing, became a wholly owned subsidiary of Skyproof (T. 529).

From late August to late October, respondent spent most of his time in Paris, Texas refurbishing and renovating the plant (T. 354, 522).

At the time of the purchase, respondent asked Merritt to consolidate the bookkeeping for both businesses in Norman, and to rent an office there for Skyproof.[4] Merritt rented a small office in his building, equipped it, and hired Barbara Holmes to run it (T. 325). Holmes, who worked for Skyproof from September 4 to October 17, 1975, furnished the office and answered the telephone (T. 325). She did little else during her brief employment other than to fill in blank checks and make daily deposits, as Merritt had done before her (T. 328).

When the floating of checks between Norman and Tampa began, in June 1975, respondent explained to Cummings that "all companies do this. It is floating, but it gives you an inflated balance and after a couple of months of this you can go to the bank . . . and you have figures that look terrific. And he said this lends credibility to a business and gives us borrowing power" (J.A. 83).

Neither respondent nor Cummings drew a salary from Skyproof or Paris Processing (J.A. 84). About $9,000 or $10,000 of the Cummings' personal expenses were paid by Skyproof (T. 497). There were about $241,000 in checks paid to H.P. Cronic or Cronic Incorporated (J.A. 93), but deposits of $278,770.34 from the same source (J.A. 92), for a net deposit by respondent of $37,770.

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[4] According to Cummings, there was "no bookkeeping" at this time (T. 493, 523). Respondent, however, had his notebook on which records of a sort were kept (T. 496), Cummings reconciled the bank statements (T. 518), and she and another woman did the billing work (T. 540). Merritt never actually got his bookkeeping underway before more pressing problems relating to the bounced checks arose (T. 492).

Cummings was not very concerned about the "floating" until respondent told her to write another $200,000 in checks to cover the purchase of Paris Processing (J.A. 84). She didn't believe there was enough money to cover that (T.492), but when she questioned large checks respondent asked her to write, he told her to call the bank and get the balance. She would call and they would "say there's $350,000" (J.A. 84). She "really had no idea what kind of money there was or wasn't" (J.A. 84).

In early October, 1975, an employee of the Tampa bank showed the Skyproof account to a bank officer and asked if it was a "kiting scheme" (J.A. 59). His "immediate opinion was that it definitely was" and he began returning unpaid Skyproof checks drawn on the Tampa bank and deposited in the Norman bank (J.A. 59). As a result, the Tampa Bank account ended up with a surplus of collected funds of approximately $500,000 (T. 239-240).

When Skyproof checks drawn on the Tampa bank and deposited in Norman began bouncing in early October, 1975, the Norman bank officials decided they were victims of a "large kite" (T. 434), there being an apparent overdraft of nearly a million dollars (T. 169).

They contacted Wylie Merritt. He assured them it was merely a bookkeeping error and there was no cause for concern (T. 289). He told them that respondent was in control of Skyproof and arranged a meeting in Dallas with respondent, himself, the Norman bank president, and the bank's attorney. At the meeting, on October 12, respondent suggested that perhaps some checks between the two banks had been lost or there had been a bookkeeping error (T. 435). He assured them that he had more than enough assets to take care of any overdraft and would make it good no matter what (T. 172). He also handed them a letter signed by Cummings for Skyproof, dated October 10 (T. 237), authorizing the Tampa bank to transfer all available funds to the Norman bank (T. 220). A collected balance of approximately $500,000 was shortly transferred to the Norman bank pursuant to that letter.

Skyproof promptly hired a Tampa CPA, who analyzed the accounts and determined that there was an overdraft of about $484,000 (T. 300). Skyproof turned over the analysis to the Norman Bank (T. 183, 281). From June through October, 1975, $4,841,000 in checks or bank transfers drawn on Skyproof's Tampa account had been deposited in the Norman Bank (J.A. 93). From April through October, 1975, $4,140,069.14 had been deposited in the Tampa account (J.A. 92). Of these total deposits, $9,981,069.14, all but about $450,000 were cleared. Thus, the net overdraft was about 4.5% of the deposits.

Cummings, as president and sole shareholder of Skyproof, signed a note to the Norman bank on November 24, 1975 (T. 507-508) for about $484,000, plus interest, secured by a mortgage on Paris Processing Co., Skyproof Manufacturing Co., and various items of equipment and personal belongings (J.A. 51). According to the bank's attorney, the mortgage gave the bank "everything from soup to nuts" (J.A. 56).

Although the first payment on the note was not due until June 1, 1976 (J.A. 57), the bank replaced the directors of Paris Processing less than two weeks after the note was executed (T. 202) and began operating the plant as its own in December, 1975 (J.A. 52).

The Norman bank operated the bottling plant from December, 1975 to January, 1978. There was never any accounting of the profits made by the bank during this period (T. 215).[5] Bank examiners ultimately forced the bank to get rid of the plant. The mortgage was foreclosed with the bank buying the plant on January 3, 1978, for the full amount of the note and judgment, $504,000 (J.A. 113-115). On the same day, the bank sold the plant to two of its directors, who formed a corporation for the purpose, for $504,000 (T. 217). This covered the note, interest, costs of foreclosure and attorney's fees (J.A. 113). The bottling plant was still operating at the time of trial, managed by the same person whom respondent had hired to

[5] Defense counsel did not subpoena the records of Paris Processing to determine how much the profits were.

manage it in 1975 (J.A. 74-75). It had twenty employees (J.A. 75).

Despite the fact that the exhibits in the case clearly proved that the Norman bank had not lost a penny (J.A. 109) — indeed that it had received interest, attorneys' fees, and legal costs, in addition to the overdraft (and the profits from two years' operation) — bank officials testified without challenge that the bank nearly collapsed as a result of the "kiting scheme" (T. 467, 174). The bank's attorney — after testifying that respondent had told him in Dallas, that "whatever happened, they would find out and certainly make it good" (J.A. 49) — when asked by the prosecutor, "Did he ever make good to this day?" responded, "No, sir" (J.A. 49). The attorney testified that his bank lost "approximately half a million dollars" (J.A. 50). Later, he volunteered that "a total of $9,000.00 may have been paid" on the overdraft (J.A. 52). The bank president also swore that "nothing has been paid" on the overdraft (T. 438).

Various bank witnesses testified that overdrafts are common (T. 260, 295). When overdrafts are honored, or immediate credit is granted on uncollected funds, which is also common (T. 104), this is an informal extension of credit for which the bank may but need not levy a charge (T. 294, 457). They also testified that a bank's lending power is determined by its total of collected deposits (J.A. 66, T. 443). Thus, floating checks between two banks, essentially reversing deposits and withdrawals, would increase the lending power of both banks.

A postal inspector testified that he had begun his investigation on October 10, 1975, on complaint of the Norman Bank, and had taken it to the United States Attorney eleven months later. He had been "living with the case five years" (T. 552). He opined that it took nearly five years to bring the indictment because the United States Attorney's Office was understaffed (T. 553).

The grand jury had heard a different explanation for the delay. In its brief in the court below, the government quoted

from a colloquy between Mr. Green (the trial prosecutor) and a grand juror:

> GRAND JUROR: Why did this take five years to — why did this take five years to put this together?
>
> MR. GREEN: . . . you have got lots of transactions. You have hundreds of checks . . . . We had just literally — there will be thousands of documents that is going to be involved in putting all of this together to show the various transactions . . . (Appellee's Brief below, p. 14)

At the end of the government's case, Mr. Colston told the court that he did not plan to call any witnesses (J.A. 94). The court then explained defendant's right to testify and found that right waived (J.A. 96). The court also noted that several witnesses had been subpoenaed at government expense, and "the witnesses were here, you just decided not to put them on?" Colston answered yes (J.A. 97).

The court also told respondent that, "This young man, Colston, I think, has done a tremendous job representing you." Respondent agreed (J.A. 94). Later, the court said it wanted to "make a record" that respondent "expressed his personal appreciation of these lawyers for the work they have done." Respondent agreed with that too (J.A. 97).

Mr. Colston made only ten objections during the trial (T. 100, 190, 194, 247, 249, 348, 376, 377, 378, 436). In none of them did he disclose the reasons for the objections. There is no reference by the defense during the entire trial to the rule against leading questions, the rule against opinions or opinions on ultimate facts, the rule against hearsay, or *any* rule of evidence. All of these rules were violated repeatedly and without objection by most of the government's witnesses (J.A. 51-52, 58, 62; T. 169-170, 183, 223-24, 403, 432, 467, 481, 516, 552, 553). No fewer than three witnesses, for example, testified, without objection, that in their opinion the banking transactions in issue constituted a "check-kiting" scheme (T. 103-104, 235, 250-54, 432, 467, 554, 557, 559).

Although a number of documents were made available to the defense prior to and during trial, the record does not suggest that defense counsel requested or received any statements of government witnesses pursuant to 18 U.S.C. § 3500. There is no reference, in cross-examination or elsewhere in the record, to any such statements or to any grand jury testimony of any of the government witnesses.

In his brief cross-examination of the Government's witnesses, Colston sought admissions that respondent was not a decision-maker or in control of any of the transactions (E.g., J.A. 53-56, 59-62, 64, 68, 72, 73, 77, 80, 85-86, 88-91). He repeatedly emphasized that Cummings, not Cronic, had signed all papers and all checks and was the president and sole shareholder of Skyproof, and that Paris Processing was a subsidiary of Skyproof. The evidence that respondent was in control and made all arrangements and decisions concerning the writing of checks, however, was overwhelming. Not only had the two codefendants so testified, but the Norman bank President, the bank's lawyer, and three other witnesses testified that respondent acted as the true owner of Skyproof in negotiations with them (J.A. 49, 69, 72, 73; T. 186, 301, 340, 342, 373, 435). Three witnesses also testified that respondent had told them that he was the true owner of Skyproof (T. 342, 373, 475).

In his summation, which took less than ten record pages, Colston continued with this "defense," urging that legal control was in Cummings and that she was the responsible decision-maker (J.A. 100-102). Colston also argued that respondent had no intent to defraud *because* "he didn't have anything to do with it" (J.A. 100). Colston also urged that the first three counts of the indictment were false. They alleged that Merritt's factoring arrangement was part of the scheme and Merritt, the government's own witness, had testified otherwise. "If you're not guilty of one, you're not guilty of any of them" (J.A. 102).

The defense submitted no requests to charge the jury and stated that the charge as given was "just fine" (T. 599).

The jury acquitted respondent on counts two and three. It rejected Colston's logic, however, and convicted respondent on the other eleven counts (T. 601).

Post-Trial Proceedings

Judge Eubanks sentenced respondent to twenty-five years in prison and an $11,000 fine but indicated that if respondent would reimburse the bank its losses, and pay his court-appointed attorney, costs and a fine, probation would be granted (J.A. 107-108). Respondent agreed, provided he could have access to the bank's books to verify the loss. The bank refused (J.A. 106).[6]

About six months after trial, respondent moved to vacate the conviction, alleging newly discovered evidence. He claimed, *inter alia*, that evidence of the foreclosure and the sale of Paris to its directors proved conclusively that the bank suffered no loss and that its two officials had committed perjury in testifying otherwise. He also claimed that the government knew or should have known of such perjury, that reasonable investigation by his counsel would have disclosed that, and that effective representation would have resulted in proof that no loss occurred.[7]

Respondent swore in his post-trial motion that he only had one "substantive meeting" with his counsel "prior to or during the trial." This occurred the day before the trial began (J.A. 122). He also swore that he was at all times displeased with his court-appointed attorney and in fact had consulted a psychologist prior to trial about how to deal with his attorney's in-

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[6] Respondent had some rich aunts that were willing to bail him out (J.A. 108).

[7] He made a similar claim about the testimony of the bank officials that the bank nearly collapsed and was almost closed down by the bank examiners because of insufficient capital, brought on by the huge loss they claimed respondent inflicted on the bank. Respondent submitted reports by the same bank officials which indicated that the bank's financial position *improved* during this period.

experience and his hostile attitude. The psychologist had advised him to try to bolster Colston's confidence by praising him in public. Respondent took that advice. A letter from the psychologist was included in the motion papers to substantiate the claim (J.A. 119). The district court declined to consider the motion pending appeal.

Appeal

On appeal, with new court-appointed counsel, respondent complained, *inter alia*, of the district court's failure to disqualify his former attorney, Levine, from representing codefendant Cummings, the failure to grant more time for trial preparation, and ineffective assistance of counsel in both the trial and sentencing phases. The complaint about ineffective representation at sentencing was based largely upon counsel's failure to contest (indeed, willingness to stipulate to) the bank's claim that it had suffered a loss of $350,000. Respondent pointed out, *inter alia*, that the bank had made a *profit* and that defense counsel should have known that.[7a]

The Tenth Circuit, finding no evidence that attorney Levine had obtained any "damaging" confidential communications from respondent, rejected the first claim (Pet. App. 62). On the issue of effective assistance, the court noted that court-appointed counsel was a specialist in real estate law and inexperienced in criminal defense. The government's investigation had yielded "literally thousands of documents, including hundreds of checks" and counsel was given only twenty-five calendar days in which to prepare (Pet. App. 2a). The court then applied a test, earlier applied in its *King* and *Golub* decisions, for inferring "inadequacy of representation without proof of *specific* prejudice at trial" (emph. supp.). According to

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[7a] Respondent also complained that he was sentenced on erroneous information — that the bank had suffered a loss (ranging, in various testimonial assertions, from $484,000 to $419,000 but coming to rest at $350,000 during sentencing) when the incontrovertible proof was otherwise. The court of appeals did not reach this issue (Pet. 2a-2b).

those decisions, prejudice may be "inferred" when "circumstances hamper a given lawyer's preparation of a defendant's case" (Pet. App. 3a). Such circumstances, relevant in the present case, the court said, include:

> (1) the time afforded for investigation and preparation; (2) the experience of counsel; (3) the gravity of the charge; (4) the complexity of possible defenses; and (5) the accessibility of witnesses to counsel (Pet. 4a).

After comparing the circumstances here to the facts in *King*, the court concluded:

> We do not hold that an attorney's lack of relevant experience inevitably leads to ineffective assistance of counsel. We simply hold that on the facts of this case, applying the criteria set down in *King* and *Golub*, Cronic cannot be said to have been adequately represented (Pet. 5a).

In its petition for rehearing, the government attached an affidavit of Ryland Rivas, prepared for that purpose (dated May 20, 1982). Rivas stated that he had been admitted to practice in 1974 and had "tried jury cases ranging from escape from the penitentiary to murder in the first degree," but made no reference to experience in federal cases or business crimes. The affidavit states that Rivas "assisted Mr. Chris Colston in his preparation of defense for Mr. Harrison Cronic," but does not say how or how much. It also states that Rivas "was present during all stages of the proceedings to assist Mr. Colston with the preparation and drafting of motions, examination of witnesses and examination of all evidence available to Mr. Colston" (Pet. Br. App. A).

In his reply to the petition for rehearing, respondent objected to the affidavit as outside the record. He also disputed it. The record refutes the implications of the affidavit, if not its literal terms. Rivas may have been "present," but he did not assist in any motions, because no motion was filed. Nor did he participate in the examination of witnesses or in anything that appeared in the record. The record establishes that if he was present, it was as little more than a spectator.

The Court of Appeals denied the petition for rehearing without opinion.

SUMMARY OF ARGUMENT

The constitutional right to effective assistance of counsel emanates from two distinct sources: the Due Process Clause and the Sixth Amendment. Under the Due Process Clause, the Court has developed, largely since *Powell* v. *Alabama*, 287 U.S. 45, 71 (1932), standards regarding the right, inherent in due process, "to defend with counsel," see *Ungar* v. *Sarafite*, 376 U.S. 575, 589 (1964). Judicial impairments of the defense which unfairly undermine a defendant's right "to defend with counsel" are violations of the Due Process Clause. The main focus is not on the defense lawyer but on the opportunity the court affords an accused to prepare and present a defense. The competence of the defense attorney has a bearing upon the assessment of the fairness of the opportunity to defend, but only as part of the larger question.

Whether a defense attorney exercised the requisite degree of skill, judgment, diligence, zeal and loyalty is a question of constitutional dimension in itself, emanating primarily from the Sixth Amendment right to assistance of counsel. Where there otherwise is a fair opportunity to "defend with counsel," the focus shifts from fundamental fairness and the larger inquiry posed by *Powell* and its descendants to the narrower question of whether the failings of the particular defense lawyer denied the accused effective assistance in the Sixth Amendment sense.

Both the due process right to fundamental fairness and the Sixth Amendment right to competent counsel are potentially involved in the present case. The decision of the court below, however, was plainly predicated upon fundamental unfairness. Petitioner is wrong in assuming that the only issue here is the competence of counsel in the narrow Sixth Amendment sense.

I

Taking the due process perspective first, the question before the Tenth Circuit was whether, under all the circumstances, the defendant had a fair opportunity "to defend with counsel." If he did not, his conviction is invalid without regard to prejudice. This is because the *court* failed to permit that fair opportunity.

Cases requiring *per se* reversal, such as *Powell*, *Glasser*, *Geders*, and *Holloway*, are not distinguished from this one by the concept of "external restraint." The trial court's appointment of an inexperienced lawyer over the defendant's objection is as much "external restraint" as was involved in those cases. When, moreover, the court allows only 25 days for that inexperienced counsel to prepare, that is an "external restraint" too. These are court-imposed restrictions, not conditions inhering in the mental operations of the defense lawyer.

To require identification of a specific failure of counsel, and prejudice therefrom, would overrule *Powell*, and would miss the point. Where a fair opportunity to prepare and present a defense is absent because of a court's rulings, no fair trial has occurred. A search for specific failings of counsel in such a case would shift the blame from the court to the lawyer and would be virtually irrelevant. A failure to find specific derelictions by counsel would only beg the fundamental fairness question.

The court below was plainly correct in holding that, under all the circumstances, respondent did not have effective assistance of counsel in the sense in which those terms are used in *Powell*. The trial court was clearly informed, in an objection made by respondent, that the attorney it was about to appoint was a real estate lawyer who had never tried a case, much less a criminal case. Instead of inquiring into the attorney's capacity to represent the accused or the time he might need to acquire that capacity, the court lectured respondent that he could not choose his own attorney. In a case in which the government took some 1800 days to prepare—with the help of postal inspectors, grand juries, accountants and auditors—the court

then gave the defense only 25 calendar days (including the 4th of July holiday), without motions or substantial assistance to prepare its case.

Even if it is appropriate to require an inference that the actual preparation and presentation of the defense was substantially affected, that inquiry cannot ignore the complexity of the case, the time to prepare, the inexperience of counsel. It makes no sense to consider each of these matters in isolation, as if each was the only problem with the trial. Plainly, each of these factors adds weight to the others. The appropriate question is whether all of them, in combination, produce an inference of unfair impairment of the defense.

Where the defense has been unfairly impaired by court rulings, as here, this Court's decisions require reversal. As in conflict of interest cases, the impairments preclude counsel from doing many things that might otherwise be done. It is impossible to reconstruct, much less to evaluate, what those things were. It also wastes a court's time to attempt to do so.

But if any showing of prejudice is required, it cannot be more than that of a significant possibility of a different result. Had the defendant been represented by experienced counsel, with adequate time to prepare, it is a certainty that such counsel would have recognized the only defense in this case—that the bank suffered no loss, indeed, made a hefty profit, and that there was no intent to defraud. There was far more than significant possibility that a jury, properly instructed as respondent's jury was not, and properly informed of the facts, would have acquitted respondent on all counts of the indictment.

II

If this were a case in which the right to "defend with counsel" had been respected by the trial court and in which the only plausible deprivation of constitutional rights lay in the defense lawyer's unseen motivations, unknown skills, and unknown competence, the decision of the court below would still have been correct.

Neither law nor logic requires a court, before finding ineffective assistance, even in the narrow Sixth Amendment sense, to find a specific, gross dereliction by counsel. Pervasive ignorance or ineptitude may itself sometimes satisfy any standard. As all Courts of Appeals have agreed, a series of small blunders or deficiencies may be the equivalent of one or more gross derelictions. Moreover, a court is entitled to infer from demonstrated inadequacies which the record reflects that there were others which the record does not clearly reflect. Such inferences would be particularly appropriate where the demonstrated deficiencies were perpetrated by a wholly inexperienced lawyer trying a complex case with only twenty-five days to prepare.

Pervasive, serious incompetence is inherently prejudicial, as it demonstrates that the defendant did not have a fair trial. Although a court, before concluding that there was pervasive incompetence, should consider the probabilities that the deficiencies substantially affected the presentation of the defense and thus involved a gross departure from the relevant norms of competency, no additional inquiry need or should be made into "prejudice." Such a question would be redundant unless actual effect on outcome is the meaning of "prejudice." To require the accused to demonstrate his probable innocence in order to obtain relief on direct appeal from the results of a trial permeated with incompetence would be a grave, unprecedented, and shocking departure from fundamental constitutional concepts.

An examination of the record demonstrates the soundness of the analysis of the Tenth Circuit which inferred inadequate representation and prejudice from all the facts and circumstances.

There is no evidence in the record that respondent's counsel ever interviewed or even tried to interview any of the eighteen prosecution witnesses. On the contrary, it is plain that, with the possible exception of one prosecution witness, he had not previously communicated with the witnesses. No prior statements of any such witnesses to the government were requested or obtained.

Counsel pressed throughout the trial, from the opening statement (which he read) to his summation, an utterly preposterous defense: that because respondent was not the owner of Skyproof and did not write the checks, he couldn't be guilty. This is a defense that a real estate lawyer might assert in a breach of contract dispute but it shrieks ignorance of elementary principles of criminal law. Counsel apparently did not know that his client was responsible for what he directed or advised, whether or not he was the "owner" or in formal "control" of the company or the bank accounts.

Only ten objections were tendered during the entire trial by defense counsel. None of *them* referred to or reflected knowledge of any rule of evidence. Most witnesses were permitted without objection to run on in narrative form, to opine about the defendant's guilt, and to inject inadmissible hearsay. Two witnesses, the attorney for the bank and the bank president, were permitted to lie about the bank's losses without challenge. Counsel had in his hands an exhibit that itself showed that the bank had suffered no loss. He apparently did not read it or, if he did, did not understand it.

Despite the obvious complexity of the case and the acknowledged need for an expert to analyze the bank's transactions, defense counsel employed no expert and did not himself analyze the transactions. In his summation, counsel made no effort to discuss the flow of checks, the possibility of bookkeeping errors, or anything of the sort.

Counsel did not pursue the only conceivable defense, lack of fraudulent intent. Nor did he request any instructions on that issue. A number of favorable instructions would have been given had counsel requested them, e.g., that repayment is evidence of good faith and no intent to defraud, that depositing a check is not a representation there is cash on deposit to cover the check.

Counsel made the ridiculous argument that the Government has to prove all eleven counts or the defendant should be

acquitted: "If you're not guilty of one, you're not guilty of any of them."

Under any standard of effective assistance, and certainly under the proper standard, respondent was denied effective assistance of counsel in violation of the Sixth Amendment.

III

Respondent does not understand petitioner to claim that the record fails to show ineffective assistance of counsel. Petitioner's position, therefore, is a complaint about the writing of appellate opinions. The court below "on the facts of this case" inferred that there was ineffective assistance. That conclusion was overwhelmingly supported by the record. It is not and should not be the law that a Court of Appeals may not grant relief unless it first details the basis of its conclusions or, here, the specific failings of counsel which it thought fell below the range of competence demanded of a criminal defense attorney. Courts can and frequently do grant relief without writing any opinion at all. Surely they cannot properly be reversed for not writing a longer opinion than they wrote.

If this Court disagrees with respondent, however, it should remand to the Court of Appeals to permit that court to provide the necessary explication. That court should also be given the opportunity to consider whether, if its judgment is not required by the Constitution, it is warranted under the supervisory power or the Speedy Trial Act which, according to a recent decision of the Ninth Circuit, would itself have required reversal here.

ARGUMENT

I

THE TRIAL COURT PREVENTED ADEQUATE PREPARATION AND PRESENTATION OF THE DEFENSE. THUS, THE COURT BELOW CORRECTLY HELD THAT RESPONDENT WAS NOT "ADEQUATELY REPRESENTED." ITS DECISION IS SUPPORTED BY BOTH THE DUE PROCESS CLAUSE OF THE FIFTH AMENDMENT AND THE RIGHT TO COUNSEL CLAUSE OF THE SIXTH AMENDMENT.

This Court long has held that where appointed counsel is required, the Due Process clause of the Fifth Amendment is satisfied only by "effective appointment of counsel." *Powell* v. *Alabama*, 287 U.S. 45, 71 (1932). This requires, at a minimum, that counsel not only be present at every critical stage of the proceedings, but that the appointment be made early enough in the proceedings to permit adequate preparation. *Powell* v. *Alabama*, *supra* at 57-59. This is the right to "effective aid in the preparation and trial of the case," *id.*, at 71, and is part of a larger right to defend against the charges, the most basic element of due process.[8]

Since the issue is fundamental fairness, there is no *per se* rule against which tardiness in the appointment of counsel, see *Chambers* v. *Maroney*, 399 U.S. 42, 54 (1970), or refusal to permit a continuance, see *Morris* v. *Slappy*, ___ U.S. ___, 103 S. Ct. 1610, 1616 (1983), can easily be measured. The courts may balance against this right the public's interest in the orderly administration of justice. *Morris* v. *Slappy*, *supra*.

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[8] See also, *Avery* v. *Alabama*, 308 U.S. 444, 446 (1940), *White* v. *Ragen*, 324 U.S. 760, 764 (1945); *Hawk* v. *Olson*, 326 U.S. 271, 276 (1945).

A. *In determining how much time is needed for adequate preparation, the trial court must consider the seriousness and complexity of the case and the experience and ability of the counsel it appoints.*

In weighing the public interest in expeditious trials against the defendant's right to prepare a defense, this Court and others have considered the following factors:

1. *The seriousness of the charge.* From *Powell* v. *Alabama*, *supra*, through *Hamilton* v. *Alabama*, 368 U.S. 52 (1961), *Gideon* v. *Wainwright*, 372 U.S. 335 (1963), *Argersinger* v. *Hamlin*, 407 U.S. 25 (1972), and *Scott* v. *Illinois*, 440 U.S. 367 (1979), this Court has recognized that the seriousness of the charge will affect the scope of the "right to defend with counsel." The Courts of Appeals have repeatedly, and apparently unanimously, agreed that in determining whether adequate preparation time has been afforded, the seriousness of the charge is an important consideration. See, e.g., *Rastrom* v. *Robbins*, 440 F.2d 1251 (1st Cir.) cert. denied, 404 U.S. 863 (1971); *Moore* v. *United States*, 432 F.2d 730 (3d Cir. 1970); *Wolfs* v. *Britton*, 509 F.2d 304 (8th Cir. 1975); *Townsend* v. *Bowmar*, 351 F.2d 499 (6th Cir. 1965).

The most significant gauge of the seriousness of the charge is the maximum penalty the accused faces. *Harris* v. *Housewright*, 697 F.2d 202 (8th Cir. 1982). A subsidiary, hindsight test of seriousness is the imprisonment actually imposed. *Wolfs* v. *Britton*, *supra*.[9]

2. *The complexity of the case.* Both in determining whether counsel is required at all[10] and in determining adequate preparation time, the factual and legal complexity of the case is often of equal significance to the seriousness of the

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[9] See generally, Duke, *The Right to Appointed Counsel: Argersinger and Beyond*, 12 Amer. Cr. L. Rev. 601, 609-612 (1975).

[10] See *Argersinger* v. *Hamlin*, 407 U.S. 25, 47 (1972) (Powell, J., concurring); *Gagnon* v. *Scarpelli*, 411 U.S. 778 (1973).

charges. *United States ex rel Spencer* v. *Warden, Pontiac Corr. Ctr.*, 545 F.2d 21, 23 (7th Cir. 1976).

3. *Other burdens or hindrances to trial preparation.* When witnesses are scattered, their locations unknown or they are numerous, adequate preparation time will be correspondingly enlarged. *Wolfs* v. *Britton, supra; United States* v. *Rothman*, 567 F.2d 744 (7th Cir. 1977).[11]

4. *The experience of counsel.* Experience of counsel in the preparation and trial of criminal cases corresponds to preparation time. Experienced counsel will know how to contact witnesses, how to interrogate them, how and where to find documents, how to obtain subpoenas and have them served, where to find relevant experts. Moreover, an understanding of the relevant procedural and substantive law will not only guide counsel in his or her search for evidence but will also help determine the admissibility and relative importance of potential evidence. The trial of a criminal case is a complex, technical, rule-bound undertaking. A lawyer who is not intimately familiar with that law and practice—even if he or she is a skilled investigator—will not know where to begin an investigation, much less how to complete it.

A lawyer who is inexperienced in the trial of criminal charges and has a limited time in which to prepare must make an unguided choice between learning the law and procedures applicable to the case and investigating the facts.

Only a lawyer who is experienced in a specialized form of criminal practice, of which the charges are a part, can employ most of his or her efforts in factual preparation. Federal mail fraud law is an arcane mystery to those who are not familiar with it. The language of the statute provides little more than a clue to the elements of the offense. See, e.g., *United States* v.

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[11] Several courts also consider, as a rough gauge of complexity and other burdens of preparation, the amount of time it took the prosecution to bring its indictment. See *Townsend* v. *Bomar, supra; United States ex rel Spencer* v. *Warden, supra; United States* v. *Golub*, 694 F.2d 207, 215 (10th Cir. 1982).

Margiotta, 688 F.2d 108 (2d Cir. 1982), cert denied, 103 S. Ct. 1891 (1983). There is no generally available treatise on the subject.

The impact of inexperience on the preparation and presentation of a defense is pervasive and of low visibility. As the Chief Justice observed in his Sonnett lecture, to assume that "every person admitted to the bar [is] qualified to give effective assistance [in] . . . the trial of criminal cases . . . is no more justified than [assuming] that every holder of an M.D. degree is competent to perform surgery. . . ." Burger, *The Special Skills of Advocacy: Are Specialized Training and Certification of Advocates Essential to Our System of Justice?*, 42 Fordham L. Rev. 227, 231 (1973). The Chief Justice rightly observed that there "is no parallel" to "our naive assumption that every graduate of a law school is, by virtue of that fact, qualified for the ultimate confrontation in the courtroom. No other profession is as casual or heedless of reality as ours." *Id.* Seven years later, the Chief Justice adhered to these views, noting that intervening studies had supported them. Burger, *Some Further Reflections on the Problem of Adequacy of Trial Counsel*, 49 Fordham L. Rev. 1 (1980). If the assumption that a real estate lawyer is "qualified for the ultimate confrontation in the courtroom" is "naive," without "parallel," and "heedless of reality," the court below was surely correct in concluding that such inexperience, when combined with the manifold other disadvantages thrust upon the accused, was evidence of prejudice. The court should be commended for opening the door, if only a crack, to the light of reality.[12]

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[12] For other cases considering the experience of counsel as a factor in determining adequate preparation time, see *Rastrom* v. *Robbins*, *supra*; *United States ex rel Williams* v. *Twomey*, 510 F.2d 634 (7th Cir.) cert. denied. *sub nom. Sielaff* v. *Williams*, 423 U.S. 876 (1976).

B. *The trial court made adequate preparation impossible by appointing an inexperienced lawyer in a complex, serious case and then giving the counsel only twenty five days to prepare.*

The factors discussed above make it plain that no precise test can be constructed for deciding how much preparation time is constitutionally adequate. The totality of the circumstances must be weighed. Respondent here claims no right to have had appointed on his behalf a lawyer specializing in mail fraud. Nor does he claim any constitutional right to a specific minimum amount of time to prepare for trial. The two factors must be considered together. It is clear that the ability and experience of the counsel appointed affects the amount of time needed to adequately prepare. Here the trial court appointed a lawyer who it knew had never tried a case, much less a criminal case, much less a mail fraud case. He specialized in real estate law, and so could be expected to have at best only the most general acquaintance with criminal law and procedure. With those facts known to the court, it was incumbent on the court to make an independent evaluation of the time needed to prepare, in order to safeguard respondent's right to defend against the charges. The court could not expect the lawyer to know what was needed.[13]

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[13] Petitioner's argument that Colston's failure to renew his motion for a continuance is a waiver of the claim (Pet. Br. 36) is without merit. The court made it clear on June 19 that the matter was closed. There is, moreover, an affirmative duty on the part of the trial court to permit adequate preparation time. See *Townsend* v. *Bomar*, *supra*. This was *a fortiori* true where the court knew that counsel was without experience, respondent had objected to such an inexperienced attorney being appointed, counsel had asked for permission to employ an expert and an investigator yet had never made the appropriate motions, and the court had been apprised that it might take counsel 30 days just to understand the government's documentation. It was simply outrageous, under these circumstances, to appoint Colston, fix the trial date for 25 days hence, then forget about the matter.

Nor is there substance to petitioner's suggestion that everything was repaired when the court asked, at the outset of trial, if both sides were ready and Mr. Colston said "ready." Clearly, "ready" in such a context does not

Instead, the court disregarded the plain facts before it: (1) respondent faced a maximum sixty-five years in prison on a thirteen-count indictment; (2) the case had taken the government four and one-half years to develop,[14] involved thousands of documents, and eighteen witnesses from four states half a continent apart, (3) the charges involved mail fraud, a complex and arcane specialty of federal courts and criminal law.

The court below considered all the factors that the trial court failed to consider, and held that "applying the[se] criteria . . . Cronic cannot be said to have been adequately represented." (Pet. App. 5a). In so holding, the Tenth Circuit was not only consistent with its prior decisions, e.g., *United States* v. *King*, 664 F.2d 1171 (10th Cir. 1981), it was plainly in line with other circuits.[15] It is hard to believe that any court would have held otherwise.

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have the meaning petitioner assigns to it. It is a time-honored formality that means no more than "present." Even if counsel had said, "I am fully prepared," this would be entitled to little weight since counsel didn't know what is meant to be prepared. See *United States ex rel Williams* v. *Twomey*, *supra*; *United States* v. *Badwan*, 624 F.2d 1228, 1234 (4th Cir. 1980) (dissenting opinion). This case does not remotely resemble *Morris* v. *Slappy*, *supra*, where defendant's attorney, an "experienced counsel," 103 S.Ct. at 1614, repeatedly stated that he had fully investigated the case, was fully prepared, and did not need a continuance, and the court, after making factual inquiries into counsel's preparation, found that he was in fact fully prepared.

[14] See *United States* v. *Mitchell*, 354 F.2d 767, 769 (2d Cir. 1966) (where criminal act charged had occurred nine months before, it did "not lie in the Government's mouth now to urge the need for such speed that the trial could not be delayed . . .").

[15] *Rastrom* v. *Robbins*, *supra* (1st Cir.); *Moore* v. *United States*, 434 F.2d 730, 735 (3d Cir. 1970) (en banc); *Coles* v. *Peyton*, 389 F.2d 224, 226 (4th Cir.) cert. denied, 393 U.S. 849 (1968); *Garland* v. *Cox*, 472 F.2d 875 (4th Cir.). cert. denied sub nom, *Slayton* v. *Garland*, 414 U.S. 908 (1973); *MacKenna* v. *Ellis*, 280 F.2d 592, 600 (5th Cir. 1960), affd. 289 F.2d 928 (en banc); cert. denied, 368 U.S. 877 (1961); *United States* v. *Knight*, 443 F.2d 174 (6th Cir. 1971); *United States ex rel Williams* v. *Twomey*, *supra* (7th Cir.); *Wolfs* v. *Britton*, *supra* (8th Cir.).

The court below was also right in ruling that where preparation of a defense is unfairly impaired, prejudice may be inferred. "[T]here is no way an appellate court can say precisely how a given case would have been handled by a reasonably diligent and properly prepared lawyer. The prejudice from lack of preparation and experience cannot be nicely weighed." Accord, *Moore* v. *United States*, *supra*.

C. The court below was correct in holding that no specific prejudice need be shown in this case. Where the trial court has rendered adequate preparation of a defense impossible, it is inappropriate to require defendant after trial to prove specific errors or show that the outcome of the trial was affected.

This case fits a category familiar to this Court. This Court has held where an accused has been required to testify first, *Brooks* v. *Tennessee*, 406 U.S. 605 (1972), barred from making a summation, *Herring* v. *New York*, 422 U.S. 853 (1975), prevented from consulting counsel between direct and cross-examination, *Geders* v. *United States*, 425 U.S. 80 (1976), or forced to have a lawyer with a conflict of interest, *Holloway* v. *Arkansas*, 435 U.S. 475 (1978), reversal is required with no inquiry into prejudice. Nothing can cure such impairments of the Fifth and Sixth Amendment right to a fair chance to defend against the charges—a right that does not hinge on the guilt or innocence of the accused.

In *Brooks*, *Herring*, *Geders* and *Holloway*, the impairments of the right to defend went not to any ultimate issue of trial outcome, but to the fundamental issue of whether the trial was fair. While the error in each of those cases involved a single act by the trial court, the error in this case involved a combination of actions by the trial court: appointing a fledgling lawyer in a complex, serious case and then giving him 25 days to prepare for trial. These actions impaired the chance to mount an effective defense all the more severely because they affected not isolated moments of the trial—as when a defendant is prevented from talking to his lawyer before cross-examination *(Geders)*—but the entire proceeding. When the entire trial is

so infected, it is inappropriate to look for specific incidents of prejudice during the proceedings.[16] Moreover, this Court has recognized that such an inquiry would be futile:

> In the normal case where a harmless error rule is applied, the error occurs at trial and its scope is readily identifiable. Accordingly, the reviewing court can undertake with some confidence assessing the likelihood that the error materially affected the deliberations of the jury . . . but [where there are conflicting interests] the evil . . . is in what the advocate finds himself compelled to refrain from doing . . . Thus, an inquiry into a claim of harmless error here would require, unlike most cases, unguided speculation.

Holloway v. *Arkansas*, *supra*, 435 U.S. at 489-491. A lawyer who is faced with an impossible burden of trial preparation is, like the attorney with a conflict, "compelled to refrain from doing" many things, both in trial preparation and in the conduct of the trial. An appellate court is forced to engage in "unguided speculation" to attempt to determine whether a viable defense could have been presented by a better-prepared lawyer. If automatic reversal is appropriate in an improper conflict case, it is *a fortiori* appropriate when the court has unfairly and severely hampered preparation of the defense.[17]

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[16] The main difference between *Brooks*, *Herring* and *Geders* and the present case is that those cases involved impairments on the *presentation* of the defense whereas the instant case involved impairment of the preparation *and* presentation, as did *Holloway*.

[17] A conclusion that the defense was substantially impaired necessarily requires a court to infer that a defense, if it existed, could not likely have been mounted under the circumstances. Having thus concluded, a court would be engaged in a redundant exercise to look for specific proof that the defense was inadequate. In urging that only specific, gross derelictions can evidence inadequate preparation, petitioner is, in effect, arguing that only direct evidence is permissible: circumstantial evidence is forbidden. Petitioner would rightly label such a claim, if asserted by an accused, as sophomoric. See *Castaneda* v. *Partida*, 430 U.S. 482, (1977); *U.S. Postal Service* v. *Aikens*, ___ U.S. ___, 103 S.Ct. 1478 (1983).

Had the court below selected specific instances in the trial which it thought evidenced inadequate preparation, petitioner would doubtless contend, with

The *per se* rule of *Holloway* applies only where the trial court is apprised of the conflict, fails to make proper inquiry into the claims and a conflict of interest actually existed. *Cuyler* v. *Sullivan*, 446 U.S. 335, 348-49 (1980). The same analysis is appropriate in a claim of lack of fair opportunity to prepare for trial.

The defense may usually be expected, in support of a request for more time to prepare or a more experienced lawyer, to make, as here, a preliminary showing of the need for such requests.[18] The court's obligation at that point is to take the claims seriously, to balance competing interests, and to make findings. *United States* v. *Burton*, 584 F.2d 485, 492 (D.C. Cir. 1978) *cert. denied*, 439 U.S. 1045 (1978); *Brown* v. *United States*, 264 F.2d 363, 369, (D.C. Cir.) (en banc) (Burger, J. concurring in part) cert. denied, 360 U.S. 911 (1959); *Giacalone* v. *Lucas*, 445 F.2d 1238, 1240 (7th Cir. 1971), cert. denied, 405 U.S. 922 (1972).

Claims which are transparently flimsy or false can be rejected out of hand. Those with apparent substance may require merely a few minutes of on-the-record exploration of the claims

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some merit, that the court should have viewed the entire record as a whole rather than isolating specific shortcomings from their context. See *United States* v. *Gibbs*, 662 F.2d 728 (11th Cir. 1981); *Wade* v. *Franzen*, 678 F.2d 56 (7th Cir. 1982).

[18] A different case is presented where no such claims are proffered, or where counsel fails to request a continuance that is needed. If there is nothing in the record to suggest any problems, the court is normally entitled to assume that there are none, at least if the time given for preparation is within the normal range. If that assumption turns out to be false, the proper inquiry is of a narrower, Sixth Amendment variety, as discussed in part II of this brief. But see *United States ex rel Williams* v. *Twomey*, *supra*, note 15; *MacKenna* v. *Ellis*, *supra*, note 15; *Townsend* v. *Bomar*, *supra*; and Schwarzer, *Dealing With Incompetence Counsel-The Trial Judge's Role*, 93 Harv. L. Rev. 633, 651 (1980), suggesting that there is an affirmative obligation on the part of a judge to make an independent determination whether there is sufficient time to prepare, without a request for a continuance.

by the trial judge in order to establish their lack of substance. Moreover, when such an inquiry discloses that the claims of the defense have merit, the trial judge is not bound by the remedies proposed by the defense but is free to fashion his or her own. When that has been done, the trial court's decision is entitled to considerable deference. If, as here, the trial court fails to adequately inquire into the need for more time to prepare, then that is simply another factor for the reviewing court to take into account in deciding whether defendant's right to defend against the charges was violated.

In this case, several options were open to a conscientious trial court. The court was under no necessary obligation to name a different, more experienced lawyer. It was under no necessary obligation, under the Constitution, to allow more than twenty-five days to prepare. However, if it was of great importance that the trial take place promptly, a more qualified lawyer was manifestly required. *Rastrom* v. *Robbins*, *supra*. If a more qualified lawyer was not available, the court could have provided a fair chance to defend by a lengthy continuance, some direction for counsel, and periodic progress reports and conferences.[19]

D. Even if some showing of prejudice is warranted, the appropriate standard is a "harmless error" test assigning the burden to the government to show the impairments imposed by the trial court could not have prejudiced the defendant.

Even if it is appropriate in a case such as this to make an inquiry into prejudice, the government should bear the burden, under *Chapman* v. *California*, 386 U.S. 18 (1967), of proving the absence of prejudice beyond reasonable doubt. *Harris* v. *Housewright*, 697 F.2d 202 (8th Cir. 1982); *Garland* v. *Cox*, *supra*, note 15. If a defendant has made strong claims—

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[19] Much of this could have been delegated to a magistrate. See *Identifying and Remedying Ineffective Assistance of Counsel: A New Look After* United States v. Decoster, 93 Harv. L. Rev. 752, (1980).

not vaguely but specifically—that circumstances exist which prevent adequate opportunity to prepare—and the trial court in effect rules "so what," a *prima facie* case of constitutional violation has been made out. The prosecution could rebut the claim by showing that at trial counsel was in fact adequately prepared. As appears in part II, however, such a showing could not have been made here.

The court below was correct in looking to the likelihood of prejudice before the trial. But even if this Court decides that prejudice at trial must be examined, that inquiry—no matter who bears the burden of proof—must focus on how the chance to defend against the charges was impaired, not on whether the result might have differed. Thus the court must look to the conduct of the defense in light of the judicial impairments, and not on whether in the absence of such impairments the defendant might have been acquitted. Even petitioner concedes that it is enough for reversal if errors "fundamentally undermined the fairness of the proceedings" (Pet. Br. 16, 25).

But petitioner seems to claim in addition that appellate court cannot reverse a conviction upon an inference of generalized or pervasive prejudice, but must identify, *in its opinion* (see Pet. Br. 35),[20] specific prejudice, *e.g.*, motions that might have been made, questions that could have been asked. No authority is, or could be, cited for this proposition. Since appellate courts can—and often do—decide without any opinion at all, it makes no sense to require them, when they do write an opinion, to go into any specific detail.[21] Given the overloaded dockets of the Courts of Appeals, petitioner's argument would impose a heavy burden on judicial review.

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[20] Petitioner even asserts that "there was no finding by the court below that respondent was at all prejudiced by the timing of the substitution of counsel and the trial" (Pet. Br. 36). There was, of course, no such finding by the district court, but that the court of appeals so found could hardly have been plainer.

[21] During the year ending June 30, 1962, the United States Court of Appeals disposed of 23,780 cases. Of these dispositions, only 12,802—slightly more than half—were accompanied by opinions, and only 5,042—less than

In addressing claims of judicial impairment of the right to defend against criminal charges, this Court should consider three main factors in its analysis: If (1) the impairments on the defense were made known to the trial court (or were reasonably obvious), (2) the trial court declined reasonably to respond to the claims or make findings or seek responsive solutions, and (3) the circumstances strongly evidenced a substantial, unnecessary and pervasive burden on the preparation and presentation of the defense, then *per se* reversal of convictions in such cases is required under the guidance of *Holloway* and *Cuyler* v. *Sullivan*. In such cases, there is a clear failure by the court to respect the fundamental rights of the accused to a fair trial, and a high probability of prejudice. But where the third factor is absent or the probability of prejudice is slight, the prosecution should be permitted to establish harmless error under *Chapman* v. *California*, *supra*. Where none of the factors are clearly present, the defense should bear the burden of proving prejudice. Respondent's case clearly requires *per se* reversal. But even if some showing of prejudice is required, the decision of the court below was correct in reversing respondent's conviction. Actual, specific prejudice appeared on almost every page of the record.

II

THE COURT BELOW COULD CLEARLY HAVE HELD THAT RESPONDENT WAS DENIED EFFECTIVE ASSISTANCE, BY REASON OF THE PERFORMANCE OF HIS COUNSEL, IN VIOLATION OF THE SIXTH AMENDMENT.

Where the trial court is directly and substantially implicated in impairing the defendant's opportunity to defend, the first focus should be on fundamental fairness. The competence of counsel is only one of many factors to be considered in

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one-fourth—were accompanied by *signed* opinions. See Annual Report of the Director of the Administrative Office of the United States Courts (1982), p. 84. See generally, Duke, *Commentary*, Second Circuit Review, 45 Brooklyn L. Rev. 847 (1979).

determining whether the accused received due process. If the broader inquiry fails to yield the conclusion that due process was denied, however, the court must consider whether the accused received "effective assistance of counsel" as guaranteed by the Sixth Amendment.

A. *The meaning of effective assistance*

Although this Court had not determined with any precision what "effective assistance" entails, it is clear the accused in any serious criminal prosecution, see *Cuyler* v. *Sullivan*, *supra*, has a constitutional right to the loyal, zealous, competent services of an attorney acting as his representative. See *Von Moltke* v. *Gillies*, 332 U.S 708, 725-726 (1948). The open issue is the norm below which the performance of counsel will be considered "ineffective" and a deprivation of the Sixth Amendment right.

All Circuits other than the Second have long since rejected the old "farce and mockery" standard and substituted, under the *aegis* of *McMann* v. *Richardson*, 397 U.S 759 (1970), objective standards. See Appendix B to petitioner's brief. Respondent respectfully suggests that this Court should validate an objective standard that reflects the various kinds of fealty owed by counsel to his client: (1) undivided loyalty, (2) zealous, diligent advocacy, (3) skill, and (4) knowledge. Such qualities, prerequisites to an adversary system, have long been recognized by the American Bar Association as fundamental attributes of a lawyer.[22] To hold that an accused may

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[22] This Court will probably not want to take a definitive stand on the controversy that erupted in the Court of Appeals for the District of Columbia over whether the A.B.A. Standards Relating to the Defense Function are binding specifications of minimal competence, guidelines, or aspirations. See *United States* v. *Decoster*, 624 F.2d 196 (D.C. Cir.) (*en banc*), *cert. denied*, 444 U.S. 944 (1979). It is plain that such standards and codes of ethics are relevant in determining what may be expected of defense counsel (see *Jones* v. *Barnes*, ___ U.S. ___, 103 S.Ct. 3308 (1983), *Herring* v. *New York*, 422 U.S. 853, 862 (1975); *Holloway* v. *Arkansas*, 435 U.S. 475, 486 n.8 (1978)), and it should probably be left at that.

be convicted while "represented" by a lawyer who does not hold to such standards would tear at the fabric of our constitutional system.

In considering the appropriate norm, several considerations should be noted. First, while an accused may have a right to dispense with the services of an attorney for his defense, *Faretta* v. *California*, 422 U.S. 806 (1975), the exercise of such a right is equivalent to a slow plea of guilty. An accused who seriously contests the charges is usually incapable of doing so without the services of an attorney. See *Faretta* v. *California*, *supra*, at 838-840 (Burger, C.J., dissenting); *Powell* v. *Alabama*, 287 U.S. 45, 68-69 (1932); *Johnson* v. *Zerbst*, 304 U.S. 463 (1938); *Gideon* v. *Wainwright*, 372 U.S. 335, 334-345 (1963). Thus, the abstract existence of a "choice" is entitled to no weight in determining the appropriate standards of competence.

Second, this Court held that a defense attorney has broad power to forfeit his client's basic rights. See, *e.g.*, *Wainwright* v. *Sykes*, 433 U.S. 72 (1977); *Engle* v. *Isaac*, 456 U.S. 107 (1982). This Court has even held than an attorney can disregard the requests of his client to brief and argue nonfrivolous issues on appeal *Jones* v. *Barnes*, ___ U.S. ___, 103 S.Ct. 3307 (1983). Such powers are predicated upon "the superior ability of trained counsel . . ." *Id.*, at 3312, and "professional evaluation" of "[e]xperienced advocates." *Id.* It also assumes diligent, zealous, and loyal counsel. See *id.*, at 3316-3318 (Brennan, J., dissenting).[2]

An accused with retained counsel has the right to select an attorney whom he hopes has the qualities that the foregoing decisions presume. A court may not normally refuse a reasonable continuance to permit counsel of choice to defend the case. *Gandy* v. *Alabama*, 569 F.2d 1318 (5th Cir.) *cert. denied*, 374

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[2] For similar assumptions underlying the power of a lawyer to forfeit his client's rights at trial, see *Wainwright* v. *Sykes*, *supra*, 433 U.S. at 93-94 (Burger, C.J., concurring).

U.S. 863 (1978). If the accused is dissatisfied with his retained counsel, moreover, he can fire him and hire another, provided the substitution does not produce inordinate delay. *United States ex rel Spurlark* v. *Wolff*, 683 F.2d 216 (7th Cir. 1982).

An indigent accused, however, has no say in the selection of his attorney and may have another substituted only under the most compelling of circumstances. *United States* v. *Calabro*, 467 F.2d 973 (2d Cir.), *cert. denied*, 410 U.S. 926 (1972). If, on the other hand, he is lucky enough to draw an attorney in whom he *has* confidence, he, unlike the accused with retained counsel, has no cognizable interest in having that attorney rather than another represent him. *Morris* v. *Slappy*, *supra (dictum)*.

Thus, the accused must accept representation by an attorney about whom he knows little and, in the case of an indigent, who is selected for him, and such attorney can make binding forfeitures without even consulting the client. Such allocations of power between lawyer and client, if they can be justified at all, *cf. Faretta* v. *California*, 422 U.S. 806, 820-821 (1975), cannot rationally rest on anything but an assumption that the attorney—in the gravest of contexts—possesses a high level of loyalty, skill, diligence and knowledge. When the assumption is false, courts should—and must—acknowledge the truth. The facts of defense counsel incompetence cannot be covered up by slogans, shibboleths, or citations to cases. To hold to a fiction of competence would deny the American system of justice its essential claim to respect. See *Wainwright* v. *Sykes*, *supra* at 117-118 (Brennan, J., dissenting).

Third, no standard of minimal competence will have any practical meaning if the courts so shackle the procedures for asserting incompetence that no relief can be obtained. Petitioner's claim that intrusive scrutiny into the competence of defense counsel would "dampen the ardor of defense counsel" and undermine "the sense of mutual trust in criminal cases generally" (Pet. Br. 19, n. 8) is overblown. This Court recently suggested that a "meaningful relationship," including a rela-

tionship of trust and confidence between attorney and client, "is without basis in the law." *Morris* v. *Slappy*, *supra*. If such trust is worth preserving, however, and both petitioner and respondent agree that it is, it and "the ardor of defense counsel" will not be encouraged by a system which virtually precludes inquiry into the competence of counsel. On the contrary, nothing could be better calculated to encourage trust, confidence, ardorous preparation and performance than an assurance by the judicial system that all counsel are—in fact as well as in theory—held to significant standards of loyalty and effectiveness.

Fourth, the suggestion in petitioner's brief (pp. 19-20) that constitutional concepts should play no part in remedying incompetence—that reliance instead should be placed upon the law schools, bar committees, legislatures and other nonjudicial bodies to improve the quality of the defense bar—must be rejected. Nothing can be clearer than that such reliance has in the past been misplaced. Widespread defense counsel incompetence has been exposed for more than a decade by our most prominent jurists[24] and academics,[25] and there is little evidence of progress. The plain, blunt fact is that people who are accused of crime are numerical minorities and, most significantly, ethnic and economic minorities. Providing effective

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[24] Burger, *The Special Skills of Advocacy: Are Specialized Training and Certification of Advocates Essential to Our System of Justice?* 42 Fordham L. Rev. 227 (1973); Bazelon, *The Defective Assistance of Counsel*, 42 U. of Cinn. L. Rev. 1 (1973); Bazelon, *The Realities of Gideon and Argersinger*, 64 Geo. L.J. 811 (1976); Kaufman, *Does the Judge Have the Right to Qualified Counsel?* 61 ABAJ 569 (1975); Wilkey, *A Bar Examination for Federal Courts*, 61 ABAJ 1091 (1975).

[25] Waltz, *Inadequacy of Trial Defense Representation as a Ground for Post-Conviction Relief in Criminal Cases*, 59 N.W.U.L. Rev. 289 (1964); Finer, *Ineffective Assistance in Counsel*, 58 Cornell L. Q. 1077 (1973); Tague, *The Attempt to Improve Criminal Defense Representation*, 15 Amer. Cr. L. Rev. 1091 (1977). See also, President's Commission on Law Enforcement and Administration of Justice: The Challenge of Crime in a Free Society, pp. 128-129, 149-153 (1967).

assistance, especially at state expense, is widely regarded as assisting criminals in crime.[26] Preserving our constitutional system is not an issue that gets votes in legislative halls. Reliance upon the good will of politicians to correct injustice to minorities will not work. That is why we have a Bill of Rights. The education, training, and resources necessary for effective assistance will be provided if *and only if* the courts require it. The only way they can require it is by giving real meaning to constitutional concepts.

Another reality that must be acknowledged, however, is that progress by adjudication must be deliberate and somewhat open-textured. Impossible standards cannot be imposed on the trial courts. Courts too must be educated; and sometimes wisdom—even judicial wisdom—comes slowly.

To describe the norm of effective assistance as "within the range of competence demanded of attorneys in criminal cases" as many circuits do, *e.g.*, *Knight* v. *Johnson*, 699 F.2d 162, 166 (4th Cir. 1983); *Ackridge* v. *Hopper*, 545 F.2d 457, 459 (5th Cir.), *cert. denied*, 431 U.S. 941 (1977), is to do more than suggest, as this Court did in *McMann* v. *Richardson*, *supra*, that *some* competence is demanded. Meaning is given to the standard by the Third Circuit, which requires "the customary skill and knowledge which normally prevails at the time and place," *Moore* v. *United States*, *supra* note 15. That standard, however, omits any reference to diligence, zeal or loyalty and suggests that the meaning of effective assistance can be determined entirely by parochial practices.[27] The Seventh Circuit has suggested that the norm may be derived from the prosecution ("shockingly inferior to what may be expected of the prosecution's representation"), *United States* v. *Weston*, Nos. 82-1545 and 82-1863 (7th Cir. 1983), slip op 5. The Sixth Circuit says that "defense counsel must perform at least as well as a

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[26] See Bazelon, *The Defective Assistance of Counsel*, *supra*, note 24, at 1-2.

[27] See Erickson, *Standards of Competency for Defense Counsel in a Criminal Case*, 17 Amer. Cr. L. Rev. 233, 241 (1979).

lawyer with ordinary training and skill in the criminal law and must conscientiously protect his client's interest," *Beasley* v. *United States*, 491 F.2d 687, 696 (6th Cir. 1974). This formulation implicitly recognizes the importance of skill, loyalty, zeal and knowledge. It also requires a comparison not with real estate lawyers but with practicing criminal lawyers. The Tenth Circuit requires the attorney to "exercise the skill, judgment and diligence of a reasonably competent defense attorney." *United States* v. *Golub*, 694 F.2d 207, 213 (10th Cir. 1982).

Respondent suggests that an amalgam of the Circuit formulations is appropriate: an attorney should exercise the zeal, diligence, skill and knowledge normally possessed by or reasonably demanded of criminal defense attorneys. This formulation focuses upon all the essential attributes of an effective assistant and requires the court to evaluate performance not only by comparison to customary practices but by reference to evolving standards. It is also sufficiently vague to permit case-by-case development.

B. *Departures from norms of competency that constitute ineffectiveness.*

1. Specific, gross derelictions are not necessarily required

Respondent has no difficulty with the contention that if specific derelictions are asserted, e.g., failure to object to inadmissible evidence, such claims must be evaluted in terms of (1) the gravity of their departure from constitutional norms of effectiveness and (2) the relationship of the departure or dereliction to relevant concepts of "prejudice." Such claims are capable of judicial resolution in approximately the same manner that other claims of trial error are evaluated.[28]

But respondent's case is not such a case. The circumstances of counsel's appointment, his inexperience, the complexity of

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[28] This is considered at length *infra*.

the case, the burdens of preparation, were such that respondent *could not* have received the level of peformance from his attorney that the Constitution requires. It was quite unnecessary for the court below to spell out how that performance departed from relevant norms because it departed at every phase of the proceedings. Only a most extraordinarily skilled, seasoned practitioner, perhaps a specialist in mail fraud and banking practices, could have adequately represented respondent *under the circumstances* facing his lawyer. Plainly, Mr. Colston could not meet those burdens. His "most serious mistake . . . may have been in accepting the appointment in the first instance." *Harris* v. *Housewright*, *supra*, 697 F.2d at 205.

Respondent, in the court below, pointed to several deficiencies of performance by his counsel. The court was entitled to infer that these deficiencies, while *perhaps* not sufficient in themselves to constitute ineffective assistance, were just the "visible tip of the iceberg."[29] A lawyer who makes those kinds of mistakes makes many others, some apparent on the record, some not apparent, especially when performing under the adverse conditions in the present case. Specific instances of incompetence may not themselves be flagrant, but they may warrant an inference that there were others of a like kind. Petitioner seeks to deny to a reviewing court the ability to use its own experience, its own reasoning powers, and its own common sense, in concluding that the overall effect of counsel's performance was inadequate.

The Tenth Circuit is far from alone in refusing to reject common sense. As the Eighth Circuit recently observed, "[n]o single error made by the petitioner's appointed counsel is of constitutional dimension. Yet, when viewed cumulatively, the multiple errors revealed in the record . . . demonstrate that counsel's total performance was below the level of professional skill customary for competent counsel similarly situated."

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[29] See *United States* v. *Decoster*, *supra*, note 22, 624 F.2d at 279-280, n. 87 (Bazelon, J., dissenting). See also *Garland* v. *Cox*, *supra*, note 15.

Harris v. *Housewright*, 697 F.2d 202, 206 (8th Cir. 1982). See also *United States* v. *Hammonds*, 425 F.2d 597, 604 (D.C. Cir. 1970); *Cooper* v. *Fitzharris*, 586 F.2d 1325, 1333 (9th Cir.) *(en banc), cert. denied*, 440 U.S. 974 (1978); *United States ex rel Green* v. *Rundle*, 434 F.2d 1112 (3rd Cir. 1970); *Garland* v. *Cox*, *supra*, note 15.

There is no reason why a series of small blunders or failings cannot be the equivalent of one whopper, yet petitioner argues that unless counsel commits some grievous error that itself is prejudicial, there can be no ineffective assistance (Pet. Br. 35). No court has taken this approach and this Court should not do so.

An appellate court can also consider, as one of the facts and circumstances, the manner in which counsel was appointed and supervised. In *Cuyler* v. *Sullivan*, 446 U.S. 334 (1980), this Court laid to rest the notion that only defendants with court-appointed counsel are entitled to "adequate legal assistance." But it does follow that the performance of the trial judge in selecting and supervising the appointment of defense counsel for indigents is immaterial in determining whether effective assistance was received. The court has an obligation to the indigent accused, under *Gideon* v. *Wainwright*, *supra*, that it does not owe to the accused who retains his own counsel, an obligation to *appoint* competent counsel. *Harris* v. *Housewright*, *supra*, 697 F.2d at 205. *Smotherman* v. *Beto*, 276 F. Supp. 579 (N.D. Tex. 1967).[30]

As noted above, considerations of autonomy which underly the right of an accused to counsel of his choice are absent when the accused seeks an attorney provided by the state. The notion of equal justice which informed *Cuyler* v. *Sullivan* also suggests a compensatory Sixth Amendment right of the indigent, reflecting the absence of choice in selection of counsel,

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[30] *Cf. Washington* v. *Watkins*, 655 F.2d 1346, 1355 (5th Cir.), *cert. denied*, 456 U.S. 949 (1981) (Constitution requires "counsel reasonably *likely to render* and rendering reasonably effective assistance") (emphasis supplied).

to an exercise by the court of a conscientious, informed decision to appoint competent counsel and to provide such supervision as is necessary to assure that counsel is in fact rendering effective assistance.[31]

Moreover, where, as in the present case, the defendant makes concrete objections to the qualifications of counsel, this should trigger more than a sarcastic retort. An inquiry into the claims should be made. *United States* v. *Calabro*, *supra*; *Brown* v. *Craven*, 424 F.2d 1166, 1169 (9th Cir. 1970). "[A] trial judge who appoints fledgling attorneys as defense counsel, over the defendant's protest, cannot wash his hands of their mistakes." *MacKenna* v. *Ellis*, *supra*. As this Court said in *McMann* v. *Richardson*, 397 U.S. 759, 771 (1970),

> [I]f the right to counsel guaranteed by the Constitution is to serve its purpose, defendants cannot be left to the mercies of incompetent counsel, and . . . judges should strictly maintain proper standards of performance by attorneys who are representing defendants in criminal cases in their courts.

A court's conscientious efforts to select and supervise appointed counsel should weigh favorably in determining whether the performance of counsel was within the requisite norms. However, if these duties are shabbily performed and the court makes no inquiry into the experience or skill of the attorney, the seriousness of the case, or its complexity, this should weigh, along with other circumstances, in determining that counsel may have been ineffective.

Respondent is not suggesting that the way in which the trial court chooses defense lawyers or supervises their performance should ever in itself warrant a finding of ineffective assistance.

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[31] See Bazelon, *The Realities of Gideon and Argersinger*, *supra*, note 24, at 830-831; Schwarzer, *supra*, 93 Harv. L. Rev. at 641, 649-664; *The Right to Counsel and the Neophyte Attorney*, 24 Rutgers L. Rev. 378 (1970). See also, A.B.A. Standards Relating to The Function of the Trial Judge §§ 1.1, 3.4 (1972); A.B.A. Standards Relating to Providing Defense Services § 2.2 (1967).

But *cf.*, *United States* v. *Calabro*, *supra*. Regardless of the manner in which a lawyer is selected, an accused who asserts ineffective assistance must still make a preliminary showing of incompetence. But once that showing has been made, the quality of the trial judge's performance of his or her obligations becomes relevant.

In the Western District of Oklahoma, any member of the state bar and any member of any federal court bar is eligible for admission to the bar of the Western District.[22] There are no separate qualifications, as is the case in some districts. Any member of the bar is also apparently eligible, without any special training or any experience of any kind, to be placed on the roster of C.J.A. attorneys. When need for appointment arises, the attorney's name is normally selected in rotation, from an alphabetical list. Thus, there is neither requirement nor procedure for training, and no attention routinely paid to the seriousness or complexity of the case.[23] As the record in the present case suggests, no inquiry is made into the suitability of an attorney for a particular case. Such a system is virtually designed to provide ineffective assistance.

The record in the present case also suggests that no effort is made to determine if the attorney is prepared for trial or even understands what it means to be prepared. Respondent's pretrial suggestion that Colston was not experienced enough to try the case was treated with disdain and sarcasm. Only when the

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[22] Rule 4(c), Rules of the United States District Court for the Western District of Oklahoma (Eff. June 7, 1977; Eff. Sept. 1, 1982).

[23] The court's rules effective in 1977 make no reference to a selection procedure under the Criminal Justice Act. Rule 40 of the Rules Effective September 1, 1982, however, provides "Private attorneys will be appointed by the Judges of this Court. Said appointments shall be made on a rotational basis, subject to the Court's discretion to make exceptions due to the nature and complexity of the case, an attorney's experience, and geographical considerations." Thus, while the court has discretion to depart from the rotational list, the normal practice, as the record in the present case suggests, is otherwise, or at least was otherwise when respondent's counsel was appointed.

prosecution's case was completed and the defense indicated it would call no witnesses at all did the court make any inquiries. Its inquiries, moreover, were to "make a record," not to determine the facts. Coercing from the accused expressions of satisfaction shortly before his unwanted lawyer is about to make his summation is hardly the kind of supervision or honest concern that the Constitution contemplates.[33a]

If trial courts are to be as callous in their regard for the fundamental rights of the accused as was the district court, they have only themselves to blame if convictions are reversed. If, on the other hand, they make a serious effort to select qualified counsel, and to assure, during the course of the trial, that counsel is exercising the necessary competence, a record will be made that will be difficult to contest when and if an accused challenges his conviction on Sixth Amendment grounds.

[33a] Respondent's acquiescence in the trial judge's assertion that his counsel had done a good job (an opinion for which the record provides absolutely no basis) is entitled to no weight whatsoever. If an accused is incompetent to represent himself, how can he be competent to evaluate the professional performance of his lawyer? *Cf. Brennan* v. *Blankenship*, 472 F. Supp. 149 (W.D. Va.), *affd.*, 624 F.2d 1092 (4th Cir. 1980); *United States* v. *Marshall*, 488 F.2d 1169, 1192-1193 (9th Cir. 1973); *United States* v. *Unger*, 700 F.2d 63 (8th Cir. 1983); *Blackledge* v. *Allison*, 431 U.S. 63 (1977) (Defendant's denial of plea bargain not preclusive of contrary allegations in § 2255 proceeding). If respondent's remarks were sincere, they may well have been based upon his counsel's erroneous advice that the "he had nothing to do with it" defense was really a defense. In short, if the defense lawyer is grossly mistaken about the law, the client is nonetheless entitled to believe him, with the result that the client is nonetheless entitled to believe him, with the result that the client erroneously thinks he has a good lawyer. There is good reason, however, to doubt that respondent's remarks were sincere. In the first place, they were not volunteered but extracted from him, in open court, in front of his lawyer, who had respondent's life, or a sizable chunk of it, in his hands. All that respondent could expect to gain from disagreeing with the judge would be the anger of the judge *and* his attorney. See also respondent's post trial motion, where he explains that he publicly praised his lawyer's performance because he was advised to do so by a psychologist whom he consulted to try to determine what to do about his lawyer's inexperience and hostility (J.A. 119).

Given the grave deficiencies in defense lawyer training and in resources available for defense services, it is unrealistic to suggest that every accused is entitled to experienced counsel. Surely, however, the court of appeals was correct in its observation that this was not the case "for an aspiring criminal defense lawyer to cut his teeth on" (P. App. 5a).

Inexperienced lawyers can be given basic training before appearing in any case and they can get their early experience in uncomplicated misdemeanors. Later, they can "second-chair" experienced attorneys in more serious cases. Finally, they can be appointed in multi-defendant cases in which experienced attorneys are lead counsel. There is no reason for any court to do what the trial court did, and no reason to fear that affirmance of the decision below will create an untenable right to experienced counsel.

In evaluating claims of ineffective assistance, courts frequently give weight to the experience of counsel.[34] A decision that was arguably a blunder may be considered a tactical judgment if made by an experienced attorney, but not if made by a fledgling. *Wade* v. *Franzen*, *supra*. A close, more critical look will be taken. This approach, which appears to be nearly universal, is the correct one. Inexperience is never *per se* ineffective assistance but neither should absurd presumptions be employed to validate the blunders of a neophyte.

2. "Substantial" error, "gross" derelictions, "cause and prejudice"

Respondent agrees with petitioner that the departure from competency norms should be "substantial" (Pet. br. 24) in order to be defective. Whether it must also be, as petitioner

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[34] See, *e.g.*, *United States ex rel Williams* v. *Twomey*, *supra*; *Harris* v. *Housewright*, 697 F.2d 202 (8th Cir. 1982); *Crismon* v. *United States*, 510 F.2d 356, 357, n. 3 (8th Cir. 1975). *Cf. Michel* v. *Louisiana*, 350 U.S. 91 (1955); *Morris* v. *Slappy*, *supra*. Sometimes, a wealth of experience will still produce an ignoramous. See *Young* v. *Zant*, 677 F.2d 792 (11th Cir. 1982).

suggests, "gross," "flagrant," or "serious" (Pet. Br. 16, 32, 33) depends on the meaning of those terms.

A "substantial" departure could include sub-par performance without regard to effect on outcome and with little or no regard to the matter concerning which the performance was inadequate. If that is the only test of ineffectiveness, then one would have difficulty arguing that there should not also be an additional requirement for relief: a requirement of prejudice. If "prejudice" is narrowly defined to include only effect on outcomes, however, the right to effective assistance would, in many cases, be empty. Accepting such a narrow view of prejudice and casting the burden on the accused would mean that only an accused who can prove himself probably innocent would have a right to effective assistance. The obligation of the prosecution to prove guilt beyond reasonable doubt, *Mullaney* v. *Wilbur*, 421 U.S. 684 (1975), would retain vitality only where the accused had competent counsel. This would encourage judges to appoint able counsel for defendants against whom the prosecution appeared to have a weak case and less able counsel for defendants against whom the prosecution appeared to have a strong case. The demoralizing effects of such practices on the "appearance of justice," *Offutt* v. *United States*, 348 U.S. 11, 14 (1954), as well as justice itself, can hardly be exaggerated.

Requiring the accused to bear any burden of establishing prejudice in the narrow sense of outcome-determination would also be at war not only with *Chapman* v. *California*, *supra*, but with the Court's many holdings that deprivation of the right to counsel is too fundamental to permit harmless error analyses. E.g., *Glasser* v. *United States*, 315 U.S. 60 (1942); *Holloway* v. *Arkansas*, *supra*.

If, on the other hand, defective assistance of counsel is defined as including only "gross" or "serious" departures from the norm, the legitimate interests protected by harmless error concepts can be built into the standard: a gross departure, properly defined, will exist only when the incompetence was of the *type* likely to affect outcomes or so serious or pervasive as

to make the trial fundamentally unfair or the verdict suspect. An inquiry into prejudice would be largely redundant. Defective assistance will be "inherently prejudicial" or, at most, subject to the prosecution's right, under *Chapman*, to prove harmlessness beyond reasonable doubt.[35]

What is a gross departure will depend on context. A failure to investigate a line of defense would not be gross if it was the result of an informed professional judgment that a better, inconsistent defense is available. *Cf. Fritchie* v. *McCarthy*, 664 F.2d 208, 215 (9th Cir. 1981). Failure to make a thorough extrinsic investigation may be mitigated by the fact that substantial evidence has been obtained from the prosecutors and from the defendant. Whether a failure to investigate is defective assistance should also be measured from the time the lawyer failed to investigate.[36] It is also appropriate to consider the seriousness of the stakes. A case involving the death penalty is surely entitled to more thorough preparation than a mail fraud case and the latter, especially one such as respondent's, requires more thorough preparation than a simple assault.[37]

In suggesting that the focus, in cases of pervasive incompetence or abdication of basic functions by counsel, should be on potential prejudice rather than actual prejudice in the narrow sense of outcome-determination,[38] respondent makes

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[35] The approach above closely resembles that of Judge Hufstedler in *Cooper* v. *Fitzharris*, *supra*, 586 F.2d at 1334 (concurring and dissenting opinion), and that of Judge Bazelon, in *United States* v. *Decoster*, *supra*, 624 F.2d at 264 (dissenting opinion).

[36] See *Cooper* v. *Fitzharris*, *supra*, 586 F.2d at 1220, n. 10.

[37] Respondent suggests that this is so clear as not to be debatable. This does not mean, however, that the norms or the requisite departures from them sufficient to constitute defective assistance are necesarily different in a death penalty case than in any other case. What is gross in one context, however, may not be gross in another.

[38] *Chambers* v. *Maroney*, *supra*, does not require actual prejudice in that sense. The Third Circuit, whose opinion in that case was affirmed, had a rule that belated appointment of counsel was presumptively prejudicial and required the prosecution to prove otherwise. It had held in *Chambers* that the prosecution had met its burden of showing the absence of prejudice. Judge

no novel suggestion.[38] This Court frequently reverses convictions for violations of constitutional rights without finding actual prejudice. Even in pure due process, fundamental fairness cases, reversals are commonly based not upon any inference of actual effect on outcome but upon the outcome-threatening aspects of the procedure. See, e.g., *Gardner* v. *Florida*, 430 U.S. 349 (1977); *Sheppard* v. *Maxwell*, 384 U.S. 333 (1966); *Estes* v. *Texas*, 381 U.S. 532 (1965); *Turner* v. *Louisiana*, 379 U.S. 466 (1965); *In re Murchison*, 349 U.S. 133 (1955). As the Court noted in *Estelle* v. *Williams*, 425 U.S. U.S. 501, 504 (1976):

> The actual impact of a particular practice on the judgment of jurors cannot always be fully determined. But this

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Bazelon argued in his *Decoster* dissent that this Court, in leaving that presumption undisturbed, impliedly approved it. See 624 F.2d at 292, n. 140. In any event, commentators generally read *Chambers* as holding no more than what it says: "tardy appointment of counsel" does not require *per se* reversal. If the timing of the appointment gives rise to an inference of prejudice, however, that is another matter. See *Ineffective Representation as a Basis for Relief from Conviction: Principles for Appellate Review*, 13 Col. J. of L. & Soc. Prob. 1, 77, n. 257 (1977); *Garland* v. *Cox*, *supra*, note 15.

[38] See generally, *A Functional Analysis of the Effective Assistance of Counsel*, 80 Col. L. Rev. 1052 (1980); *Identifying and Remedying Ineffective Assistance of Criminal Defense Counsel: A New Look After* United States v. Decoster, 93 Harv. L. Rev. 752 (1980). This analysis can easily be reconciled with *United States* v. *Morrison*, 449 U.S. 361 (1981). There, after a defendant was indicted and retained counsel, DEA agents met with her, tried to get her to cooperate, and denigrated her lawyer. She refused to cooperate and informed her lawyer of what the agents had done. This Court held that dismissal of the indictment was not a proper remedy "absent demonstrable prejudice, or *substantial threat thereof*" (emph. supp.). Arguably, the conduct in *Morrison* was not a violation of the Sixth Amendment at all; merely an *attempted* violation. In any event, there was no reason to believe or even to suspect that the force of it would have continued to the trial. To have held that dismissal was proper would have raised serious questions about whether excluding a confession obtained by violation of the right to counsel is a sufficient remedy, yet of course it is. There must be some real relationship between the violation and the trial, and no opportunity to cure the effects of the violation short of reversal. There manifestly is no cure for ineffective assistance which culminates in a conviction, short of undoing it.

> Court has left no doubt that the probability of deleterious effects on fundamental rights calls for close judicial scrutiny. Courts must do the best they can to evaluate the likely effects of a particular procedure, based upon reason, principle and common experience.

When the alleged incompetence is not of the pervasive sort or does not involve abdication of basic lawyering functions, but rather relates to discrete, identified failings, such as failure to object to inadmissible evidence or failure to request a favorable charge, context both requires and permits an actual examination into what is generally, though confusingly, referred to as "specific prejudice."[40]

While failure to investigate or to prepare a defense can rarely be a tactical decision designed to benefit the accused, failures to object or to request instructions are often consistent with an effort to win a case. Where specific derelictions are alleged, therefore, courts should scrutinize the reasons for the apparent dereliction. Inquiry may reveal that it was not due to ignorance or inattention but was a reasonable tactical judg-

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[40] The distinction between pervasive incompetence and discrete errors, and the propriety of looking for "prejudice" in the latter case but not in the former, has been recognized by *United States ex rel Green* v. *Rundle*, 434 F.2d 730 (3d Cir. 1970); *Wade* v. *Franzen*, 678 F.2d 56, 59 (7th Cir. 1982); *Harris* v. *Housewright*, 697 F.2d 202, 212 (8th Cir. 1982); *United States* v. *Porterfield*, 624 F.2d 122, 124-125 (10th Cir. 1980). A divided panel in the Ninth Circuit rejected the distinction in *Ewing* v. *Williams*, 596 F.2d 391 (1979). It acknowledged the difficulty, however, of finding no prejudice in pervasive incompetence cases. Moreover it recognized, as the *en banc* court had recognized in *Cooper* v. *Fitzharris*, 586 F.2d 1325 (9th Cir. 1978), that a court can find "unfairness—and thus prejudice—emanating from the totality of counsel's errors and omissions."

The distinction made by the above courts and urged here by respondent can also be harmonized with the principle that precludes harmless error rulings in Sixth Amendment cases. A claim that counsel was incompetent in failing to object, for example, should not normally be elevated above what it would have been had the objection been made and *overruled*. Thus, if overruling the objection would be harmless error, counsel's failure to object was probably not "gross."

ment. If so, there would be no "substantial" deviation and the inquiry would end. If, on the other hand, such inquiries reveal that the dereliction was "substantial," it would be appropriate to ask whether, in context, it was also substantial or significant in the sense that it had a "reasonable likelihood," see *United States* v. *Agurs*, 427 U.S. 97 (1976), of affecting the outcome. If the answer is negative, then no "gross" dereliction occurred and the accused was not denied effective assistance of counsel.[41] If the answer is yes, there is no need for an inquiry into "prejudice." To require, as petitioner suggests, a showing of "gross dereliction" *and* "prejudice" is duplicative and confusing.[42]

This Court should resist petitioner's suggestion that the criteria for reversal of a conviction for ineffective assistance

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[41] However, the matter is not always that simple. Some trial errors, e.g., adverse judicial comment on the failure of the accused to testify, racially derogatory remarks, refusal to permit a summation, require reversal even when they are not in any sense outcome-determinative. In short, since there really is no generally applicable rule of "harmless error," distinctions in the strength of the policies underlying various rules of procedure should be preserved. Analysis of discrete derelictions by defense counsel should not mute all distinctions in types of trial error under the blanket of harmless error or, as respondent formulates it, "non-gross" error by defense counsel. As Judge Bazelon cogently asked, of "what possible significance is it to the defendant whether his counsel fails to present closing argument because the court denies him that opportunity, see *Herring* v. *New York*, 422 U.S. 853 (1975), or because he foregoes it in order to avoid a parking ticket?" *United States* v. *Decoster*, *supra*, 624 F.2d at 289, n. 126 (dissenting opinion). This analysis suggests that there should be a two-pronged inquiry in some cases: (1) whether the error for which counsel's ineffectiveness is at least partly responsible had any reasonable likelihood of affecting the verdict, and (2) if not, whether the error, had it been committed by the judge over proper objection, would nonetheless have required reversal. A negative answer to the first question and an affirmative answer to the second wouldn't necessarily require reversal, but it would suggest a more detailed analysis.

[42] See *Identifying and Remedying Ineffective Assistance of Criminal Defense: A New Look After* United States v. Decoster, 93 Harv. L. Rev. 752, 768 (1980), criticizing the plurality opinion in *United States* v. *Decoster*, *supra*, note 22, on this ground.

should be made symmetrical to the "cause and prejudice" requirements in federal habeas corpus (Pet. Br. 22). Such requirements, unlike a claim of ineffective assistance, are jurisdictional requirements, not elements of a constitutional claim. They are imposed in the interests of comity, federalism and finality upon an accused who has already had a "full and fair opportunity" to defend himself, to appeal, and to avail himself of state collateral remedies. They are imposed to encourage defendants and their attorneys to abide by procedural rules; to make the trial the "main event." *Wainwright* v. *Sykes*, 433 U.S. 72, 90 (1977). They have no place here, on direct appeal.

While ineffectiveness is a factor used in determining whether to give effect to procedural defaults in a *habeas* case, there are many others. See *id.*, at 94-96 (Stevens, J., concurring). Included are the values of the particular constitutional right allegedly forfeited. *Cf. Stone* v. *Powell*, 428 U.S. 465 (1976); *Rose* v. *Mitchell*, 443 U.S. 545 (1979). Moreover, these requirements relate to specific, discrete procedural defaults. The burden on an accused who seeks to be relieved from a conviction for ineffective assistance based solely upon such a procedural default should in some cases be higher than the "cause and prejudice" requirements,[43] sometimes lower,[44] but always different. If pervasive, cumulative or basic incompetence is claimed, the issues are *entirely* different than those of "cause and prejudice." There may be no "cause and prejudice" which would warrant relief from a particular pro-

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[43] Unless, of course, the Court accepts the wholly untenable position asserted implicitly by petitioner in its *Amicus* brief in *Strickland* v. *Washington*, *supra*, that a habeas corpus petitioner must establish his probable innocence in order to show "prejudice" under those standards.

[44] If, for example, defense counsel were not to object to evidence which was the fruit of a patently unconstitutional seizure because he or she did not personally believe in the exclusionary rule, or because he or she had never heard of it, and such evidence was harmful to the outcome, it is difficult to see how or why a court should deny relief based upon ineffective assistance, yet it is far from clear that "cause and prejudice" would be satisfied. *Cf. Stone* v. *Powell*, *supra*.

cedural default yet gross incompetence may still require that the conviction be set aside.

It is true, as petitioner suggests (p. 22), that the more stringent the requirements for "cause and prejudice," the greater the incentive of an accused to attack his counsel's competence. But this is because restrictions on collateral attack, in making the trial the "main event," have greatly increased the importance of effective assistance. The assumptions upon which efforts are made to finalize a trial and direct appeal must have some relationship to reality.

C. *There were numerous derelictions of respondent's counsel, amounting to pervasive incompetence.*

Assuming *arguendo* that respondent was obliged to demonstrate that his counsel failed to perform functions that are reasonably expected of defense counsel and that such failures were "gross," they leap from the record.

1. Counsel neither interviewed nor attempted to interview the prosecution's eighteen witnesses. He also failed to seek and obtain any prior statements of such witnesses made to the government. Failure to interview witnesses is presumptive ineffective assistance. *McQueen* v. *Swenson*, 498 F.2d 207 (8th Cir. 1974); *Eldridge* v. *Atkins*, 665 F.2d 228 (8th Cir.), *cert. denied*, 456 U.S. 910 (1981). Failure to request Jencks Act material is surely in the same category. *Cf. Adams* v. *Balkom*, 688 F.2d 734 (11th Cir 1982); *Brubaker* v. *Dickson*, 310 F.2d 30, 35 (9th Cir.), *cert. denied*, 367 U.S. 824 (1962).

2. Counsel made only ten objections, none of which was coupled with any reference to any rule of evidence. He never objected to leading questions and permitted most of the prosecution witnesses to testify in lengthy, rambling narratives that were filled with hearsay and opinion, including opinions on ultimate facts, *e.g.*, that there was a "check-kiting scheme." The adversarial nature of the trial evaporated. Compare, *United States* v. *Easter*, 539 F.2d 663 (8th Cir. 1976); *Harris* v. *Housewright*, *supra*; *Griffin* v. *Winans*, 684 F.2d 686, 690 (10th Cir. 1982).

3. Counsel failed to obtain the services of an accountant, despite his own acknowledged "pressing need" for same, *Cf. United States* v. *Fessell*, 531 F.2d 1275 (5th Cir. 1976). He also failed to call a witness, or effectively employ a prosecution witness, to provide needed expert testimony. Counsel should have proved that writing checks to obtain the benefit of the "float" and to impress bankers with balances and activity is both common and legitimate. As the court told the jury at the outset, the government's case was predicated on the theory that writing a check on one bank account and depositing it in another, intending to cover it by reversing the process, was "fraudulent" (T. 7). One of the banker witnesses testified to virtually the same thing (T. 104). In fact, such practices, or practices very close to them, are commonplace, and are not regarded as fraudulent or even immoral. A popular book, for example, advises that the way to develop a good credit standing with banks is to borrow from one bank, repay with a loan from a second bank, and so on.[45] The distinction between that and what respondent advised Cummings to do is thin. Banks and other businesses throughout American play the "float" on a grand scale, using techniques very similar to respondent's. The businesses pay their bills with checks drawn on distant banks so they can use the money during the clearing process. Banks often deny depositors immediate credit for ten or fifteen days so they can have interest-free use of the money between the date of actual clearance and the date the deposit is

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[45] ". . . you can borrow $10,000 from bank number one. When it is due, you repay it with $10,000 borrowed from bank number two. When that comes due, you pay it off with a new loan from bank number one. If you want to get complicated, pay that loan off with a loan from number three.

The result is that your $10,000 is always *rolling over* between banks. . . . As mentioned, banks do not particularly like this double or triple borrowing mode of operation. Yet all big companies and all Tycoons operate on borrowed money from multiple lenders in much the same way." B. Greene, Think Like a Tycoon, 50-51 (1980).

cleared.[46] Counsel's failure to have adduced such evidence—given the court's remarks and the banker's testimony—left the jury with the clear impression that respondent lied when he told Cummings that "all companies do this" (J.A. 83), and that in fact the only people who do it are swindlers. The failure to remove or attempt to remove such erroneous impressions was manifest incompetence and denied the respondent a defense. See *Gaines* v. *Hopper*, 575 F.2d 1147 (5th Cir. 1978); *Baldwin* v. *Maggio*, 704 F.2d 1325, 1332 (5th Cir. 1983).

4. Counsel cross-examined perfunctorily, and primarily to prove an issue that was wholly immaterial: that respondent neither owned the business nor wrote the checks. Had counsel understood elementary principles of complicity, see LaFave & Scott, Criminal Law 502-519 (1972), he would have known that this line of examination was tantamount to surrender. This "defense" was pursued from the opening statement through the summation.

5. Counsel failed to identify, prepare or present respondent's only possible defense in the case, an obvious defense: there was no fraud and no intent to defraud. No misrepresenta-

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[46] M. Mayer, The Bankers, 137-142 (1974). "Float" is two credit balances represented by the same funds. *Id.*, at 137. A study for the American Banking Association estimated that there was transit float in the banking system in 1969 of $120 billion. *Id.*, at 142. Banks themselves are the biggest float players of all. If, for example, a state government makes a deposit the day it delivers checks, the bank will predict how long it takes for the checks to arrive and invest the money in short-term money-market instruments. *Id.*, at 138. Bankers refer to this as "cash management" and the managers as "float managers." They hold seminars on how to maximize float and how to deal with the increased sophistication of corporate cash managers, who are also on to "float" and thus don't leave large cash deposits sitting around for very long. See, *e.g.*, Bank Administration Institute, *Contemporary Issues in Cash Management* (Miami, Florida, October 26-29, 1980).

Fewer than 30% of checks deposited in banks are drawn on the bank in which deposited; more than 70% must be cleared and thus create "float." *Lumbering at Top Speed: The Check Collection System*, 1951-1979, Economic Review, Federal Reserve Bank of Atlanta, 29 (March, 1982).

tions of any kind were made to the Norman bank, by respondent or anyone else. See *Williams* v. *United States*, ___ U.S. ___, 102 S. Ct. 3088 (1982).

The government's own evidence supported this defense. Contrary to the allegations in the indictments, Skyproof was not a "facade" or sham. It was a very substantial, growing company. Its subsidiary, Paris Processing, was also a substantial, growing company, which Skyproof greatly improved. Because Skyproof was rapidly expanding and Paris was newly-acquired, the books were not in order. The net overdraft was only 4.5%, consistent with a bookkeeping error, especially given the quality of the bookkeeping, and the fact that respondent was far removed from what books there were when the overdraft occurred: he was in Paris, Texas, fixing up the bottling plant.

Nor was the Norman bank damaged. When apprised of the problem, respondent immediately suggested that it must have been a bookkeeping error and that, in any event, the overdraft, if there was an overdraft, would be made good. At the same time, he delivered an authorization to the Norman Bank officials to withdraw all collected funds at the Tampa Bank, some $500,000. Skyproof then hired a CPA to analyze the bank accounts and turned the report, which was accurate, over to the Norman Bank. Shortly thereafter, Skyproof gave the Norman bank a mortgage on everything it owned, including its Tampa plant and the Paris bottling company. This mortgage authorized an immediate takeover by the bank, and the bank almost immediately took over the bottling plant. It later sold the bottling plant for $504,000, almost $100,000 more than the net overdraft, for a tidy profit. In addition to that profit, it had operated the plant for more than two years and gave Skyproof no credit for any of those profits. If there was a swindler, it was not respondent—it was the Norman bank.[47]

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[47] Which, although it made a profit of approximately $100,000 from Skyproof, tried to use the criminal process to collect another $350,000 from respondent.

This very substantial defense was not only destroyed by reliance upon irrelevant technicalities appropriate only in land litigation, it was negated by the failure of defense counsel to realize that the bank had made a profit. Instead, the case went to the jury with the false testimony of the bank officials, that they had suffered a loss in excess of $400,000, unchallenged.[48]

The failure to recognize and assert a viable defense is gross incompetence, under any standard. *United States ex rel. Green* v. *Rundle, supra; Hintz* v. *Beto*, 379 F.2d 937 (5th Cir. 1967); *Young* v. *Zant*, 677 F.2d 792 (11th Cir. 1982). This defense would have certainly suggested itself to competent counsel. "The defense actually tendered was so insubstantial in relation to the one not offered as to [belie] the hypothesis that trial counsel made a deliberate informed choice," *Brubaker* v. *Dickson, supra.*

6. Mr. Colston called no witnesses. His failure to do so stemmed from his preposterous theory that respondent wasn't guilty because he didn't write the checks. While the failure to call witnesses or put on a case can sometimes be attributed to tactics, where "the lawyer is completely inexperienced in criminal litigation . . . the hypostastization of a subtle and far-seeking strategy . . . is unconvincing. [Respondent's] lawyer did not have enough criminal experience to depart from the book with any hope of success." *Wade* v. *Franzen*, 678 F.2d 56, 58 (7th cir. 1982).

7. Mr. Colston's ignorance of criminal law also deprived respondent of numerous favorable instructions to the jury. Since he had put on no defense, it was important that the jury be instructed on this matter as favorably as the law allows. Respondent was entitled, according to the standard form book on jury instructions, 1 Devitt & Blackmar, Federal Jury Practice and Instructions (3d ed. 1977), to several relevant, helpful

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[48] Even during the sentencing phase, counsel did not question the testimony about the large losses and permitted the court to sentence respondent on the assumption that such losses had been inflicted (J.A. 106-107).

charges: that the number of witnesses on a side is not determinative (§ 17.20), that the jury need not accept uncontradicted testimony (§ 17.21) and, most importantly, that the defendant had no "burden or duty of calling any witnesses or producing any evidence" (§ 17.14). None of these standard instructions was requested; none was given.

On the substantive issues, respondent was entitled to a charge that the mere depositing of a check is not a representation that there are funds on deposit sufficient to pay it. *Williams* v. *United States*, *supra*.[49] No such instruction was given and nothing said in the charge contradicted the court's preliminary remarks clearly implying the opposite (T. 7). Since the theory of the indictment and the government's case was other-

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[49] This Court held, in *Williams* v. *United States*, *supra*, in a "check kiting" prosecution under 18 U.S.C. § 1014, that the depositing of an insufficient fund check is not a "false statement" within the meaning of § 1014. This holding was based on "a simple reason: technically speaking, a check is not a factual assertion at all, and therefore cannot be characterised as 'true' or 'false'." Checks, the Court said, do "not, in terms, make any representation as to the state of [the drawer's] bank balance." 102 S.Ct. at 3092. On the contrary, they are an undertaking that if dishonored, the drawer will pay the check. *Ibid.* Since the Court's decision was based on a combination of common sense and the Uniform Commerical Code, and not the legislative history or arcane meaning of § 1014, the holding is clearly applicable to a mail fraud prosecution, *Cf. United States* v. *Elliott*, 689 F.2d 178 (10th Cir. 1982). The Court went on, moreover, to reject the government's argument that there is a "general understanding" that the drawer "had funds on deposit sufficient to cover the face value of the check." Such an interpretation, the Court said, "would make a surprisingly broad range of unremarkable conduct a violation of federal law." *Id.* at 3093. Moreover, it is "equally plausible to suggest that many people understand a check to represent that the drawer will have sufficient funds deposited in his account by the time the check clears, or that the drawer will make good the face value of the draft if it is dishonored by the bank." *Id.* at 3092, n.7. *Williams* was, of course, decided after respondent's trial. However, there was substantial authority supporting its conclusion in the hornbooks. LaFave & Scott, Criminal law, 679 (1972). See also, *Williams* v. *United States*, 278 F.2d 535 (9th Cir. 1960); Anno., *Reasonable Expectation of Payment as Affecting Offense Under "Worthless Check" Statutes*, 9 ALR 3d 719, 721 (1966).

wise, and there was no evidence of any fraudulent representations, by anyone, the giving of such an instruction may itself have produced an acquittal.

If respondent made a bookkeeping error or had a reasonable expectation that the checks would be honored, whether from funds on deposit, funds to be deposited, or the informal extension of credit, he had no intent to defraud.[50] He was entitled to a "good faith" instruction. *Steiger* v. *United States*, 373 F.2d 133, 135 (10th Cir. 1967). He did not receive anything of the kind.

It is also clear that when a defendant in a mail fraud case predicated on check-kiting reimburses the alleged victim, this is evidence that he had no intent to defraud, and respondent was entitled to an instruction to that effect. *United States* v. *Foshee*, 569 F.2d 301, modified on rehearing, 578 F.2d 629 (5th Cir. 1978). No such charge was requested; none was given.

The failure to request favorable charges to the jury, to which the accused is plainly entitled, is ineffective assistance of counsel. *Taylor* v. *Starnes*, 650 F.2d 38, 41 (4th Cir. 1982); *Harris* v. *Housewright*, *supra*.

This list of derelictions could be extended, almost indefinitely.[51] It is surely enough, however, to persuade the

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[50] Indeed, there is some authority, consistent with the *dictum* in *Williams*, see note 49 *supra*, that it is enough that the drawer of the check intends to make good on the check after it bounces. See *United States* v. *Foshee*, 578 F.2d 629 (5th Cir. 1978). It seems reasonably clear that the fraudulent intent necessary to constitute a violation of § 1341, *via* check-kiting, is an intent to deprive permanently the bank of its money. In any event, that was the theory of the indictment in the present case. On the facts of this case, moreover, the only thing that the bank could have been deceived about was the respondent's intention to make good on the checks. It was quite clear to the Norman bank that "floating" was taking place. The bank chose to overlook that, either because it valued Skyproof's business or because the "floating" increased its own deposit balances and lending power, or a combination of both.

[51] If, as the petitioner suggests, Colston's failure to renew his motion for continuance was a waiver of the defendant's right to adequate preparation time or an acknowledgement of readiness, this too was ineffective assistance.

Court that the decision below was correct, not only in its result but in its approach. Where it is plain that there was pervasive incompetence, the cumulative effect of which is a gross departure from the standards which are expected of defense counsel, it is a waste of judicial resources to pick the record apart and evaluate every misstep in the trial. It compounds the waste to detail the derelictions in an opinion. Moreover, to spread on the record counsel's glaring blunders would quite unnecessarily, and unfairly, leave the impression that the farce that resulted was entirely his fault. In truth, the trial judge was as responsible, if not more responsible, as he.

D. *The court below properly granted relief on appeal*

Where a claim of ineffective assistance is raised on direct appeal and the record needs enlargement, an appellate court should remand for a hearing, as in *United States* v. *Decoster*, *supra*. Where, however, effective *or* ineffective assistance is palpable, there is no reason to remand. Judicial resources would be wasted and resolution of the matter unnecessarily delayed. See *United States* v. *Aulet*, 618 F.2d 182, 186 (2d Cir. 1982); *United States* v. *Payne*, 641 F.2d 866 (10th Cir. 1982); *United States* v. *Fisher*, 477 F.2d 300 (4th Cir. 1973).

Deciding on the record was particularly appropriate here because this was not an ordinary ineffective assistance case. The trial judge's rulings were inextricably involved in the questions before the appellate court. Little could have been learned on remand that would have helped the government. The trial judge would not be likely to reconsider his rulings,[52] so

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United States ex rel Williams v. *Twomey*, *supra*. Colston was also seriously derelict in failing to renew the motion to disqualify Levine from representing Cummings. Since Cummings became a prosecution witness, Levine in effect joined the prosecution team. The content and direction of respondent's defense, facts which respondent had made available to Levine, and confidential communications may all have been used against respondent. A record should have been developed on this matter. The trial judge did not foreclose it (J.A. 32).

[52] The trial judge's disinclination to reconsider the matter is evidenced by his denying without a hearing Colston's motion for a new trial, which alleged

a remand would in all likelihood require another appeal, and, ultimately, a reversal.

The government rarely, if ever, objects to a claim of ineffective assistance being considered on appeal, provided the claim is rejected, see *United States* v. *Gibson*, 690 F.2d 697 (9th Cir. 1982); *United States* v. *Altamirano*, 633 F.2d 147 (9th Cir.), cert. denied, 454 U.S. 839 (1980); *United States* v. *Payne*, *supra*, even though affirmance will prove a severe handicap to a defendant's post-conviction attempts to litigate the same issue.[52] Here, the government was happy to have respondent's claims considered on their merits by the Tenth Circuit—until the government lost. No suggestion of a remand was made by the government below. The government should now be estopped from asserting that the record was insufficient to permit reversal.

Petitioner would require a defendant to seek post-conviction review in order to get relief from ineffective assistance (Pet. Br. 40 n. 30). This is not only inconsistent with this Court's efforts to enhance the finality of judgments by restricting post-conviction review, see *United States* v. *Frady*, 456 U.S. 152 (1982), it denigrates the fundamental right to counsel almost to the point of extinction. Once his appeal is exhausted, the indigent defendant no longer has a right to court-appointed counsel. See *Ross* v. *Moffitt*, 417 U.S. 600 (1974). The accused who retained counsel for the trial and the appeal will often have no more funds for post-conviction counsel. Yet there are few

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lack of opportunity to prepare, and by his declining to hold a hearing on respondent's post-trial motion which contained numerous documents, affidavits, and allegations not only of lack of preparation and incompetence but of governmental reliance on perjury. It is plain that the pendency of an appeal did not preclude the trial court from holding a hearing on that motion. *United States* v. *Siviglia*, 686 F.2d 832, 835 (10th Cir.), *cert. denied*, 103 S.Ct. 1902 (1982).

[52] See *Chin* v. *United States*, 622 F.2d 1090 (2d Cir. 1980), *cert. denied*, 450 U.S. 923 (1981) (issue raised and decided on appeal cannot be relitigated on a § 2255 motion absent intervening change in law).

situations in which a defendant needs assistance of counsel more direly than when he attacks the effectiveness of trial counsel.

Petitioner would thus force a defendant, usually without counsel, and often in prison, to prepare pleadings which would induce the district court to grant a hearing—a formidable burden indeed[54]—and then, perhaps with counsel then assigned, see *Johnson* v. *Avery*, 393 U.S 483, 487 (1969), prove not only that his attorney was incompetent but that the incompetence *produced* the conviction. See Brief for the United States as *Amicus Curiae*, Supporting Petitioners, *Strickland* v. *Washington*, *cert. granted*, no. 82-1554, pp. 12-26 ("defendant must demonstrate that the evidence probably would have affected the outcome of the proceedings"). By thus "papering over the problem,"[55] petitioner would have succeeded in requiring all defendants with incompetent counsel to prove their innocence, and requiring most of them to make at least a preliminary showing of such without the assistance of counsel!

III

IF THE COURT DOES NOT AFFIRM, IT SHOULD REMAND TO THE COURT OF APPEALS FOR FURTHER CONSIDERATION

Since the record clearly supports reversal of respondent's conviction and petitioner does not appear to contend otherwise, the only basis upon which the Court could conceivably fail to affirm the court below is for deficient reasoning or explication thereof. In that event, it should be given an opportunity to provide the required explication.

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[54] See Rules 4, 8, 9(a), Rules Governing Section 2255 Proceedings for the United States District Court, 28 U.S.C.A.

[55] See Bazelon, *The Defective Assistance of Counsel*, 42 U. of Cinn. L. Rev. 1, 20-40 (1973). Judge Bazelon argues that a proposal such as petitioner's would "emasculate the Sixth Amendment," *Id.*, at 27.

Another reason for such a remand is that there are two other bases, at least, upon which the court below could have reached the same ultimate conclusion it reached. First, the Speedy Trial Act, 18 U.S.C. § 3161(c)(2), provides: "Unless the defendant consents in writing to the contrary, the trial shall not commence less than thirty days from the date on which the defendant first appears through counsel or expressly waives counsel and elects to proceed pro se." This *minimum* period is mandatory, as the cases cited by petitioner (Pet. Br. 37, n. 26) concede. In a case of first impression, the Court of Appeals for the Ninth Circuit recently held that when a defendant appears through different counsel at different stages, the thirty day period begins to run anew when the lawyer who tries the case enters his appearance. This is because the thirty day period is designed to provide a minimum time for such counsel to prepare. The words, "first appears through counsel" refer to the lawyer who actually prepares the defense used at a trial. Accordingly, where a defendant changed lawyers and was brought to trial 29 days after he first appeared with his trial attorney, the Act required that his conviction be reversed. *United States* v. *Daly et al.*, Nos. 81-1654, 81-1655, 81-1657, 81-1661, 81-1771 (8/12/83) slip op. Since Colston appeared only 25 days before trial, and requested a minimum of 30 days to prepare, *Daly* plainly would require reversal of the conviction.

The second basis is the supervisory power. The record suggests several aspects of the trial court's handling of the matter that could appropriately be regulated by the supervisory power, e.g., the process of selecting appointed counsel, inquiries into the competence and experience of counsel, responding to complaints by defendants about their counsel, judicial responses to claims of inability to prepare, pretrial and trial supervision of counsel. Such issues are analogous to other problems of assuring effective assistance which the Courts of Appeals have chosen to regulate under the supervisory power, and which regulation this Court has recently approved. *Cuyler* v. *Sullivan*, *supra*, 446 U.S. at 346, n. 10. The opinion below does not squarely rest on the Constitution and may therefore

reflect an implicit invocation of supervisory power. Should this Court find there were no constitutional violations, the court below might want explicitly to base its judgment on the supervisory power. See *United States* v. *Milligan*, 414 F.2d 811 (5th Cir. 1969). It should, in any event, be permitted to consider that issue before its judgment is ultimately reversed. Cf. *United States* v. *Hasting*, ___ U.S. ___, 103 S. Ct. 1974 (1983), 1982 n. 1 (Stevens, J., concurring in the judgment), 1987 (Brennan, J., dissenting).

CONCLUSION

The judgment of the Court of Appeals should be affirmed. Alternatively, it should be remanded for further consideration.

Respectfully submitted,

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